

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

3 CYNTHIA B. SCOTT, et al.,) 3:12-cv-00036
4)
5 Plaintiffs,) Lynchburg, Virginia
6) June 8, 2018
7 v.) 3:30 p.m.
8)
9 HAROLD W. CLARKE, et al.,)
10)
11 Defendants.)

12 TRANSCRIPT OF MOTIONS HEARING
13 BEFORE THE HONORABLE NORMAN K. MOON
14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

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25 Proceedings recorded by mechanical stenography.

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1 THE COURT: Good afternoon.

2 Call the case, please.

3 THE CLERK: Cynthia B. Scott, and others vs. Harold
4 W. Clarke, and others, case No. 3:12cv36.

5 THE COURT: Plaintiff ready?

6 MR. HOWARD: Yes, Your Honor.

7 THE COURT: Defendants ready?

8 MS. LONDOS: Yes, Your Honor.

9 THE COURT: First thing we'll take up -- you have the
10 schedule we sent out, I think. First thing will be the
11 motions in limine, I believe.

12 (Court conferred with law clerk.)

13 MS. OGUNKEYEDE: If I may proceed, Your Honor?

14 THE COURT: You may.

15 MS. OGUNKEYEDE: Adeola Ogunkeyede on behalf of the
16 plaintiffs.

17 Based on the Court's order yesterday, I understand
18 Your Honor would like to first or primarily deal with
19 plaintiffs' motion in limine number 6. That motion in limine
20 seeks the court to establish a time period for the contempt
21 at issue in this case, as well as set out the legal standard
22 applicable to determining the plaintiffs' motion for order to
23 show cause.

24 The first part of that motion in limine seeks to
25 address the question of what time period of facts will the

1 Court consider to determine contempt. The question arises
2 because the Court expressed a preference for determining the
3 prima facie issues of the show cause at the same time it
4 considered the ultimate issue of contempt. It's a clarifying
5 question so as to streamline the presentation of evidence at
6 next week's hearing. It is not, as defendants suggest, a
7 dispositive question in this case.

8 Our position is that noncompliance should be judged
9 from February 20, '16 through September 2017. That is the
10 period from the entry of this Court's consent judgment
11 incorporating the settlement agreement through the time the
12 plaintiffs filed our motion to the Court to show cause. Any
13 facts regarding defendants' progress towards compliance
14 between September, 2017, through the present should go only
15 to the remedy. The time period that plaintiffs are asking
16 the Court to institute is appropriate from the standpoint
17 that it tracks the provisions of the settlement agreement
18 through the obligation of the defendants as well as the
19 obligations of the plaintiffs and the compliance monitor to
20 the extent that it tracks the settlement's sense of how
21 progress, appropriate progress, was to be evaluated.

22 It's also an appropriate time period from an
23 equitable standpoint, considering that defendants' actions to
24 remedy any violations of the settlement agreement from
25 September, 2017, through the present, can still be considered

1 by the Court. So it doesn't bar the Court from considering
2 those actions, but we'd ask that those actions go only to the
3 question of remedy, should a contempt finding issue.

4 Per the settlement agreement, the defendants were
5 required to implement all provisions of the settlement
6 agreement within 30 days of the effective date. That's found
7 in section 6, paragraph 2, on page 24 of the Court's
8 settlement agreement. That effective date was February 5,
9 2016. Within 30 days of compliance, the monitor in this
10 case, Dr. Scharff, began making visits to Fluvanna to track
11 compliance and to document in his reports that would produce
12 for both sides his assessment of the Department of
13 Corrections' progress towards complying with their settlement
14 obligations. The compliance monitor continued to make visits
15 and produce quarterly written reports to which both sides had
16 access and had an ability to comment on before finalization.

17 As the plaintiffs reviewed those written reports, we
18 were dismayed at the Department of Corrections' noncompliance
19 as demonstrated through the documentation provided to both
20 sides by the compliance monitor. Those areas of
21 noncompliance were found over several months in several key
22 areas under the provisions and standards of the settlement
23 agreement. Fourteen months into the compliance period that
24 plaintiffs are asking the Court to find as at issue for
25 contempt, plaintiffs put defendants on notice that they were

1 not abiding by the terms of the settlement agreement. That
2 is a notice that plaintiffs are allowed to put defendants on,
3 separate and apart from any notice that the compliance
4 monitor may or may not issue. You can find the authorization
5 for the plaintiffs that issue such a notice to the defendants
6 on page 19 of the settlement agreement.

7 Thereafter, plaintiffs waited five months to file --

8 THE COURT: Well, I can answer this pretty quickly,
9 but I'll let the defendant speak to the same issue. I mean,
10 I don't need any further argument on this -- that's what I'm
11 saying -- unless the defendant wishes to respond.

12 If you have something to say --

13 MS. LONDOS: Certainly, Your Honor. Would you like
14 me to use the podium?

15 THE COURT: I think it helps the court reporter.

16 MS. LONDOS: Thank you.

17 Good morning, Your Honor. Katherine Londos with
18 Frith Anderson & Peake in Roanoke, on behalf of the
19 defendant.

20 On the timing issue, we have prepared a highlighted
21 copy of the settlement agreement that has certain provisions
22 electronically highlighted in yellow. With the Court's
23 permission, if we could hand one to Your Honor and the -- and
24 your law clerks, would that be acceptable?

25 THE COURT: Well, I didn't really want argument. I

1 think the prima facie case has to be made as of the date of
2 filing the suit, filing this action, this show cause -- which
3 is September; right?

4 MS. LONDOS: Yes, sir. It was filed in September.

5 The only point that the defense would make on the
6 issue of the timing, Your Honor, is on pages 19 -- I'm
7 sorry -- 17 of the settlement agreement on the issue of the
8 compliance monitor's ability to reduce the frequency of his
9 visits -- and again, it's on page 17 of docket 221-1, wherein
10 the provision reads: "If the monitor in the exercise of his
11 discretion on the basis of application of the guidelines,
12 standards and PMTs set forth referenced herein determines
13 that appropriate progress has been demonstrated toward the
14 goal of constitutionally adequate medical care on a
15 consistent basis by the end of the second year" -- which
16 would be February, 2018.

17 And then the next sentence continues -- I'm sorry.
18 One sentence after that.

19 "If the monitor in the exercise of his discretion as
20 described above determines that appropriate progress has been
21 demonstrated towards the goal of constitutionally adequate
22 medical care on a consistent basis during the third year,"
23 which would be February, 2019, "then the compliance monitor
24 may reduce his visits."

25 We would respectfully argue that the timing of the

1 plaintiffs' filing of the contempt motion cannot trump the
2 language of the settlement agreement --

3 THE COURT: You mean, nothing could -- nothing that
4 went on contrary to the agreement could be brought up before
5 then?

6 MS. LONDOS: No.

7 Certainly, Your Honor, the next aspect that is
8 important is on page 26 of the settlement agreement,
9 paragraph 10, which says: "The settlement agreement shall
10 terminate as of the date on which the defendants have
11 achieved substantial compliance with all elements of
12 performance of its obligations to provide constitutionally
13 adequate medical care under the Eighth Amendment."

14 And then it says further down that sentence: "The
15 termination may not take effect less than three years from
16 the effective date."

17 This motion, Your Honor, by the plaintiff on the
18 timing of the -- the time period that the Court should
19 consider, we would argue, and the defense argues that the
20 language of the settlement agreement is -- trumps the date
21 the plaintiff files their motion. What is important is what
22 is in the settlement agreement; and the settlement agreement
23 contemplates that there is going to be a period of time
24 towards which the defendants -- again, turning back to page
25 17 -- are working towards appropriate progress has been

1 demonstrated towards the goal of constitutionally adequate
2 medical care. That is an important provision.

3 Under plaintiffs' theory on this motion, the
4 plaintiff would have -- would set the timing for what the
5 Court considers, simply by the date they filed, when the
6 language of the settlement agreement contemplates that there
7 is going to be a period of time towards which appropriate
8 progress is being demonstrated towards the goal of
9 constitutionally adequate care.

10 Under plaintiffs' theory --

11 THE COURT: Under your theory, no matter what you did
12 up until the date you say the plaintiff could file, you could
13 do anything or not do anything that the agreement calls for
14 you to do and the plaintiff would have no right to raise the
15 issue.

16 MS. LONDOS: Certainly they have a right to raise the
17 issue. The question is: What evidence should the Court
18 consider in evaluating the merits of plaintiffs' motion?

19 THE COURT: I think the Court can consider any issue
20 that you're not complying with the agreement, and, of course,
21 it can have effects on any of the inmates in the institution.
22 I mean, the agreement was designed to improve the medical
23 care of those people; bring it up, at least, to a
24 constitutional standard. We have these things that you were
25 supposed to do, and I don't see why the Court shouldn't

1 consider the whole -- everything to determine whether or not
2 you're in compliance.

3 MS. LONDOS: Absolutely, through today, Your Honor.

4 The point on these two provisions, on paragraph --
5 I'm sorry -- page 17 and page 26 of the settlement agreement
6 is implicit in this language. Implicit in these provisions
7 is that there will be a period of time towards which the
8 defendant is working towards compliance with all of the
9 provisions of the settlement agreement.

10 THE COURT: But it contemplates that you will be
11 working toward it, that you don't get a free pass to do what
12 you were doing before the agreement. It didn't give you a
13 "get out of jail free card" for the next two years or more.

14 MS. LONDOS: Absolutely, and the defense intends to
15 present evidence next week of the actions taken by the VDOC
16 during this period of time that they were working towards
17 full compliance.

18 The defense believes that Your Honor should consider
19 all the evidence, both before and after filing the contempt
20 motion in evaluating.

21 THE COURT: That's what I intend to do.

22 MS. LONDOS: Thank you. Thank you, Your Honor.

23 THE COURT: Maybe we're two ships passing in the
24 night, but my idea is to hear the evidence from the beginning
25 until -- even anything that's happened after the filing.

1 MS. LONDOS: Thank you, Your Honor.

2 THE COURT: All right. The prima facie showing would
3 be as of the filing of this contempt proceeding, show cause
4 proceeding.

5 MS. OGUNKEYEDE: If I may, Your Honor.

6 THE COURT: Yes.

7 MS. OGUNKEYEDE: Very quickly on that issue.

8 As to the Court's considering everything that has
9 happened since the filing of the contempt motion through
10 today, plaintiffs have no objection to that. Our request is
11 that for determining whether or not defendants were in
12 contempt, getting this free pass that Your Honor referenced,
13 that the Court simply evaluate any actions past the filing of
14 the motion for order to show cause as going to remedies if
15 the Court does find that the defendants were in contempt.

16 THE COURT: It's time to argue that at the end of the
17 evidence. I mean, we'll parcel that out then.

18 MS. OGUNKEYEDE: Your Honor, the issue of the
19 presentation of plaintiffs' evidence may well be streamlined
20 by a finding from the Court at this juncture that the Court
21 will consider all of the evidence between the filing and
22 through present, but that which is relevant to contempt is
23 only from the consent judgment in February through the filing
24 of plaintiffs' motion for the order to show cause.

25 THE COURT: That's what I say. You have to make your

1 prima facie case out as of that day.

2 MS. OGUNKEYEDE: Yes, Judge. And plaintiffs agree
3 that our prima facie case would be under consideration from
4 February, 2016, through September, 2017. However, defendants
5 should not be able to get the benefit of the Court's
6 preference for adjudicating both the prima facie --

7 THE COURT: Y'all say my preference. Lawyers do this
8 stuff all the time. They call in here, "How do you want to
9 do this?" I recall the clerk told me, "You got this call.
10 Do you want to hear the -- all of it at one time, or do you
11 want to hear the contempt thing first?"

12 You know, it's not my case. You all decide how
13 you're going to make your motions and decide how you want to
14 proceed. Don't call me and ask me about the case because I
15 don't know what the lay of the land is. I gave you an answer
16 then, and I stand by that answer.

17 It's too late to change -- if I knew this was going
18 to be a problem, I may have decided to do it the other way.

19 MS. OGUNKEYEDE: Respectfully, Your Honor, I do
20 believe -- and I was not on the call in January --

21 THE COURT: It doesn't matter who was on the call.
22 That's water over the bridge and we're here today. I hope
23 I'm clear about how I want to proceed.

24 MS. OGUNKEYEDE: I believe Your Honor is clear, but
25 plaintiffs' position on the call in January was that we were

1 concerned that adjudicating both the prima facie issue as
2 well as the ultimate issue at the same proceeding would put
3 us in the untenable position that we then have to defend
4 against --

5 THE COURT: I didn't realize you were opposing
6 anything. Maybe something was not presented to me.

7 MS. OGUNKEYEDE: That was our position, Your Honor,
8 in January, on the call.

9 THE COURT: Okay.

10 MS. OGUNKEYEDE: Which is why we again raised the
11 issue in the motion in limine.

12 THE COURT: Now we've got a trial starting on Monday
13 and I'm going to hear it all; and I'll hear these arguments
14 about what I consider when, at the end of the case.

15 MS. OGUNKEYEDE: Okay, Your Honor.

16 If the Court will then leave this issue open as to
17 what is the relevant period for the finding of contempt,
18 plaintiffs will renew their argument that the relevant period
19 for the finding of contempt is from February, 2016, through
20 September, 2017.

21 THE COURT: Okay.

22 MS. OGUNKEYEDE: As to the second part of the motion
23 in limine No. 6, the legal standard by which to decide the
24 motion, plaintiffs' motion for order to show cause, from our
25 perspective, the legal standard is clear. First, the Court

1 must determine the prima facie issue. Should our prima facie
2 burden be met and the show cause issued, liability for
3 contempt turns on four elements that must be proven by clear
4 and convincing evidence. Defendants do not dispute the four
5 elements of contempt; instead, they seek to read into the
6 contempt standard the additional requirement that plaintiffs
7 must prove deliberate indifference in addition to any
8 violation of the obligations of the settlement agreement.
9 However, the settlement agreement does not contemplate
10 deliberate indifference as being part of the specific
11 obligations.

12 In fact, page 5 of the settlement agreement clearly
13 rejects that. It obligates, and I'm quoting, Defendants to
14 achieve and maintain compliance with the operating
15 procedures, guidelines and standards governing the provision
16 of medical care at Fluvanna. The Department of Corrections'
17 failure to follow those operating procedures, guidelines and
18 standards are, therefore, the violations of their
19 court-ordered obligations. They're more than mere technical
20 violations. They are the exact measure of the Department of
21 Corrections' compliance. For instance, standard one,
22 staffing levels. Where Department of Corrections fails to,
23 and I quote from that standard, maintain a sufficient number
24 of health staff of varying types to provide patient with
25 adequate and timely evaluation and treatment, they are in

1 noncompliance.

2 Similarly, for standard seven, with respect to
3 emergency response, whenever Department of Corrections fails
4 to timely respond to medical emergencies or maintain the
5 medical supplies and equipment necessary to respond to
6 medical emergencies, they were in noncompliance. To prevail
7 in the current posture, which is a contempt proceeding,
8 plaintiffs need only provide clear and convincing evidence
9 that those failures occurred and that the Department of
10 Corrections knew about them. Nothing in the defendants'
11 response to our motion in limine No. 6 undermines that.

12 In fact, where defendants read into the settlement
13 agreement the idea that plaintiffs must also prove deliberate
14 indifference, they are simply mistaken. And I quote from
15 plaintiffs' pretrial brief at page 44: Their mistake is
16 because the violation of the obligations imposed by the
17 settlement agreement amount to a violation of the Department
18 of Corrections' constitutional duties as it has defined them,
19 without any need for de novo adjudication of deliberate
20 indifference.

21 Plaintiffs have never been confused about the
22 standard that is applicable to this contempt proceeding. And
23 as such, we raised this issue in our motion in limine only
24 because we apprehended and recognized that defendants were
25 adding in an additional element to contempt that is not

1 there, nowhere to be found in the case law. So we wanted to
2 bring it to Your Honor's attention that at issue is solely
3 clear and convincing evidence of violations of the terms of
4 the settlement agreement.

5 THE COURT: Okay.

6 Did you wish to respond?

7 MS. LONDOS: Your Honor, the terms of the settlement
8 agreement, this Court's approved settlement agreement, under
9 the enforcement provision, paragraph 2, page 23 --

10 THE COURT: What about paragraph 1? Does that have
11 anything?

12 MS. LONDOS: Under enforcement, Your Honor; yes.

13 THE COURT: I mean --

14 MS. LONDOS: Certainly the Court has jurisdiction
15 over the parties for purposes of ensuring the implementation
16 of the settlement agreement. But paragraph 2 of the
17 settlement agreement requires that there be, in the event of
18 a problem of constitutionally deficient medical care on the
19 part of the defendant -- then an enforcement action can be
20 filed. But the first clause of paragraph 2 requires that
21 there be a problem of constitutionally deficient medical care
22 brought to the attention by either the compliance monitor or
23 plaintiffs' counsel pursuant to the provisions of section
24 42(c) of the settlement agreement.

25 Section 42(c) of the settlement agreement is

1 contained on page 19 of the settlement agreement, Your Honor.
2 And on page 19 of the settlement agreement, that contains the
3 two provisions that we refer to as the written notice
4 provision. The first full paragraph is if the compliance --
5 and this is on page 19, Your Honor. If the compliance
6 monitor during the time periods in which a settlement
7 agreement is in effect identifies a deficiency in any aspect
8 of the medical care provided by the defendant at Fluvanna
9 that he deems to involve constitutionally inadequate medical
10 care, he, Dr. Scharff, shall promptly bring the problem to
11 the defendants' attention through written notice, which has
12 never happened.

13 The next paragraph is a paragraph the plaintiffs
14 implicated -- and this is the middle paragraph, second full
15 paragraph on page 19, Your Honor. If the plaintiffs during
16 the time period in which the settlement agreement is in
17 effect identifies a deficiency in any aspect of the medical
18 care provided by the defendants at Fluvanna, that they, the
19 plaintiffs, believe involves constitutionally inadequate
20 care, then the plaintiffs may bring that to the defendants'
21 attention through written notice. So the first two
22 paragraphs on page 19 are what we're calling "the written
23 notice paragraphs." If the compliance monitor gives written
24 notice or if the plaintiffs give written notice -- and
25 written notice can only be given of a deficiency in the

1 medical care involving constitutionally inadequate care. So
2 this would be after the settlement agreement is in effect,
3 post February, 2016. If either the compliance monitor or the
4 plaintiffs deem a problem involving constitutionally adequate
5 care, they issue a written notice. Dr. Scharff didn't, but
6 the plaintiffs did.

7 That brings us over then, procedurally, to page 23,
8 the enforcement provision, and section -- I'm sorry.
9 Paragraph 2 on page 23 under the enforcement provision says:
10 In the event of a problem of constitutionally deficient
11 medical care on the part of the defendant and brought to the
12 defendant's attention by either the compliance monitor or the
13 plaintiffs pursuant to section 42(c), the written notice
14 section, then plaintiffs may institute proceedings before the
15 court.

16 So implicit, expressly stated in the settlement
17 agreement is that this legal action before the court, the
18 motion to show cause, could only be filed if there's a
19 problem of constitutionally deficient care after February,
20 2016, when the Court entered the settlement agreement. For
21 that reason, there needs to be a finding by this Court under
22 a clear and convincing evidence standard that there has been
23 constitutionally inadequate care provided post February,
24 2016.

25 I'd also point the Court to multiple other provisions

1 of the settlement agreement that indicate both implicitly and
2 expressly that the relief sought must be -- can only be
3 predicated on a constitutionally deficient care. Page 4 of
4 the settlement agreement defining the compliance monitor
5 talks about -- and this is the very last line that flows over
6 to page 5, concerning defendants' performance of its
7 obligations to provide constitutionally adequate medical
8 care. Page 5, under the statement of purpose says: In order
9 to ensure the quality and quantity of medical care provided
10 by the defendant to prisoners at Fluvanna, as of and
11 following the effective date of the settlement agreement,
12 defendant shall meet or exceed the constitutional
13 requirements under the Eighth Amendment.

14 And then, perhaps most significantly, Your Honor, on
15 page 27, the PLRA findings, which is the very last provision
16 before the signatures on page 27 of the settlement agreement:
17 The parties agree that the prospective relief established by
18 the settlement agreement is narrowly drawn, extends no
19 further than is necessary to address and remedy the
20 violations of federal rights alleged by the plaintiffs in
21 their pleadings and this action. And that sentence
22 continues.

23 So under the procedure set out in the settlement
24 agreement, plaintiffs can only prevail if at a minimum they
25 show constitutionally insufficient medical care. There are

1 other requirements, other legal requirements. That's not
2 enough to get them the relief they seek. But they cannot get
3 the relief they seek without there being a showing of post
4 February, '16, when Your Honor entered the order of
5 constitutionally inadequate care.

6 Thank you.

7 MS. OGUNKEYEDE: Your Honor, I understand the Court
8 wants to focus on motion in limine No. 6, but I think as to
9 motion in limine No. 2, the admission of documents produced
10 by the Department of Corrections and their agent, Armor,
11 there may, in fact, be an issue that would require the Court
12 to make an advanced ruling at this stage, given that
13 defendants have opposed that motion in limine No. 2, based on
14 conversations between the defendants and the plaintiffs, as
15 well as a joint stipulation signed in April of this year,
16 wherein both parties agreed to the authenticity of the
17 documents produced by the Department of Corrections as well
18 as its agent, Armor. At this juncture, plaintiffs, in
19 reliance --

20 THE COURT: You're anticipating what the defendants
21 going to do; right? Is that what you're doing?

22 MS. OGUNKEYEDE: The issue, Judge, specifically, is
23 that at this point, in reliance on conversations that have
24 been had, plaintiffs have removed from their witness list any
25 custodians of record with respect to medical records,

1 grievance reports, et cetera, that were produced by the
2 defendants to plaintiffs in this matter.

3 Plaintiffs -- I'm sorry -- defendants are opposing
4 the admission of those documents based on their response to
5 our motion in limine No. 2; and we believe that at this
6 juncture, Your Honor may need to make an advanced ruling on
7 their admissibility, given that the parties have already
8 stipulated as of April of this year to the authenticity of
9 those documents as well as conversations wherein defendants
10 represented that they didn't intend to undergo or have this
11 contempt proceeding proceed through the usual trial tedium of
12 needing to call custodians and the like to admit records that
13 are at issue in this case in evidence. Here, we have
14 defendants actually opposing motion in limine No. 2, and we'd
15 ask the Court to make an advanced ruling, short of an
16 agreement from defendants, which plaintiffs have sought that
17 the documents they themselves produced to us are admissible
18 in this proceeding.

19 THE COURT: I think the plaintiffs -- I don't think
20 the Court is limited under the enforcement paragraph. It
21 just didn't enforce in this agreement. I don't think you can
22 just sit back and not do anything that you've agreed to do
23 and not have it enforced. The whole idea of the agreement
24 was to set up a system where people were not constitutionally
25 deprived of adequate medical care. That's where all these

1 things that you agreed to do -- that's why they're in there.
2 I think defendants' position would be that you don't have to
3 do hardly any of the things you did. You just don't get
4 caught deliberately indifferent to someone's medical care.

5 I believe that I'm going to try this case based on
6 the fact that the plaintiffs have a right to show that you
7 have not complied with the terms of the agreement. At the
8 end of the case, we'll sort it all out. But I don't think
9 paragraph 5, section 5 of the agreement says, "in the event
10 of a problem of constitutionally deficient medical care." It
11 doesn't say only in the event of constitutionally deficient
12 medical care. So I propose to hear whatever evidence you've
13 got about whether there was compliance, and make the
14 defendant to respond to it.

15 MS. OGUNKEYEDE: Thank you, Your Honor.

16 As to the issue of motion in limine No. 2, regarding
17 the admission of the documents produced by the defendants,
18 those being Department of Corrections records, medical
19 records, as well as grievance records, as well as medical
20 records from the University of Virginia health system and
21 records kept by defendants' contractor, Armor, the plaintiffs
22 are, at this juncture, seeking an advanced ruling from the
23 Court on their admissibility, given the failure of
24 negotiations between defendants and plaintiffs as to getting
25 those or allowing those documents into evidence through

1 agreement. Plaintiffs do not currently have on our witness
2 list custodians of records, and we removed them in reliance
3 on conversations we had with the defendants. We are glad
4 that Your Honor will hear all of our evidence. Part of that
5 evidence will rely on records. At this point, there's no
6 agreement as to the admissibility of those records, and it
7 could cause significant delay in this proceeding if as to
8 each record --

9 THE COURT: What's the defendants' position on the
10 record?

11 MS. LONDOS: Your Honor, there is a stipulation that
12 has been entered in this case signed by both parties that my
13 colleague is pulling up that all of the records are authentic
14 and there is not a need to bring records custodians in, and
15 that has always been our position in this case. The parties
16 started out a week or two ago with a much larger potential
17 exhibit list, and we have been narrowing it down on both
18 sides, and talking and collaborating. There are hearsay
19 within hearsay issues on some of these. We have always
20 maintained -- maintain today, maintained in previous
21 conversations, we are not requiring records custodians to
22 come; we have taken that position. But given the plethora of
23 documents with some hearsay within hearsay issue or documents
24 admitted for one purpose or not the other, there are some --
25 there may be some outstanding issues.

1 There are a lot of moving parts with a lot of
2 attorneys on both sides who have been having discussions
3 here, but any suggestion that we have done anything other
4 than be completely transparent, we need to completely dispel.
5 We have said there don't need to be custodians and that's the
6 case.

7 THE COURT: It seems that you don't have to have
8 those witnesses. They stipulate to the authenticity of the
9 documents, but either side, I mean, can object to anything in
10 those documents that they may consider not admissible.

11 MS. OGUNKEYEDE: Your Honor, we agree with that
12 position. However, there are a multitude -- voluminous
13 amount of records. To the extent that the plaintiffs have
14 attempted to seek an agreement with defendants as to the
15 admissibility beyond just authenticity, but also as to the
16 meeting of particular hearsay exceptions, at this point,
17 there has not been such an agreement based off of records
18 such as medical records that are kept by the defendants
19 themselves in the course and scope of the business of
20 operating the Fluvanna prison and the medical facility there,
21 as well as the conversations that those records document.

22 THE COURT: People don't have to agree to anything.
23 You just have to bring your evidence to court.

24 MS. OGUNKEYEDE: Yes, Your Honor.

25 At this point, plaintiffs are merely stating that the

1 admissibility of those records -- the institutional records
2 provided to plaintiffs by the Department of Corrections as
3 well as University of Virginia medical records and the
4 records kept by the defendants agent, Armor, should we need
5 to go through each and every one of those documents on a
6 case-by-case basis, even without a custodian of record, will
7 significantly delay -- could significantly delay the
8 proceeding. At this point, plaintiffs would argue that those
9 records meet appropriate hearsay exceptions and should be
10 admitted and where there may be individual objections, we can
11 go through those; but on the main, those records should be
12 admitted but for objections that Your Honor finds to be
13 meritorious as the case proceeds.

14 THE COURT: I'm not sure what you're asking me to do
15 right now. They'll be just as voluminous at this hour as
16 they're going to be next week. I can't go through them, I
17 don't think, today.

18 MS. OGUNKEYEDE: We're asking the Court at this point
19 to find that the records -- the institutional records kept by
20 the Department of Corrections as well as the UVA medical
21 records and the records kept by the defendants agent, Armor,
22 be deemed admissible as they meet the specific hearsay
23 exceptions of the business record exception as well as if
24 there is an issue as to hearsay within hearsay specific to
25 the medical records.

1 THE COURT: Do I have enough in front of me to make
2 that ruling right now?

3 MS. OGUNKEYEDE: I believe, based on the facts that
4 the parties have stipulated as to the authenticity of those
5 records being kept and produced by the defendants, that that
6 is enough as to those categories of records: Institutional
7 records kept by the Department of Corrections, institutional
8 medical records kept by UVA health system as well as business
9 records kept by the defendants agent, Armor.

10 MS. LONDOS: Your Honor, on April 18th -- so over a
11 month ago -- the parties entered a stipulation that it is
12 hereby stipulated and agreed that the following categories of
13 documents are authentic and shall not require extrinsic
14 evidence of authenticity in order to be admitted as evidence
15 in this action: All documents produced by the parties and
16 third parties such as Armor, UVA, VCU; all documents produced
17 by the parties pursuant to the settlement agreement; and all
18 medical institutional file records provided by VDOC pursuant
19 to records request.

20 I would agree with Your Honor, there's certainly not
21 enough before the Court to make a blanket ruling. There are
22 going to be hearsay within hearsay objections on some, some
23 documents submitted for one purpose but not another purpose;
24 but we have stood by this stipulation since it was entered on
25 April 18th that we are not going to require evidence of

1 authenticity.

2 Thank you, Your Honor.

3 MS. OGUNKEYEDE: Your Honor, simply as a matter of
4 law, plaintiffs cannot lay the foundation for business
5 records, such as the institutional records kept by the
6 defendant and UVA and Armor, without custodian of records.
7 So it's more than just the stipulation of authenticity. If
8 we then have to lay the foundation as to those categories of
9 documents without a custodian of record --

10 THE COURT: If you have a document you want to offer
11 in evidence, why can't you just offer it in evidence, and if
12 the defendant objects, I mean, I can rule fairly quickly, I
13 think.

14 MS. OGUNKEYEDE: If, categorically, those records,
15 institutional records are admissible in that way, then Your
16 Honor can rule at this juncture and take individual
17 objections as they arise.

18 THE COURT: Records at the hospital, for the most
19 part, come in.

20 I've tried enough automobile accident cases, a doctor
21 will put in there: A patient came in and said someone ran
22 the red -- she had the green light and another car had a red
23 light and the guy with the red light ran through the
24 intersection and hurt her and she broke her ankle.

25 Well, you don't let in the fact of the accident in

1 the medical record. I mean, that's just gratuitous
2 information.

3 I don't know what's going to be in there. We'll just
4 have to go through it. I don't see why it has to be a real
5 big problem.

6 MS. OGUNKEYEDE: As long as to lay the foundation for
7 those records the Court is not requiring us to provide a
8 custodian of those records --

9 THE COURT: I think that you've agreed they don't
10 need the custodian, don't you?

11 When they stipulate the authenticity --

12 MS. LONDOS: Yes, sir.

13 MS. OGUNKEYEDE: They were also objected as to the
14 foundation of those documents. They've objected to
15 foundation in total, which is not simply authenticity. And
16 so to establish --

17 THE COURT: Are you objecting, like, the records are
18 not kept in the ordinary course of business? Is that part of
19 the objection?

20 MS. LONDOS: Anything that a records custodian would
21 need to do to authenticate the document, that's what we
22 wanted to avoid for the sake of everyone's convenience,
23 including the Court's, not having one more person in the
24 courtroom.

25 Thank you.

1 THE COURT: There's no way -- I came over from the
2 state courts about 20 years ago, and there was an expression
3 that we followed "the Weymouth rule," and that was Judge
4 Weymouth down in Norfolk, and that's that he didn't decide
5 the case until he heard the evidence.

6 I don't see how I can rule on what's admissible in
7 these records until they're presented to me to rule.

8 MS. OGUNKEYEDE: That is fair, Your Honor, to the
9 extent that plaintiffs will not be required to meet the
10 foundational elements beyond authenticity that would require
11 a proper witness. Sometimes those witnesses will need to be
12 custodians of record; sometimes it could be brought in
13 through the current witnesses designated by both sides, but
14 not all the time. We're fine with that.

15 THE COURT: You're asking me to do something you
16 couldn't get the defendant to agree to, is the way it sounds.
17 I don't know whether, without seeing the records -- whether
18 the defendant is right or wrong. The way the Court decides
19 these things is for the record to be presented, or whatever
20 the evidence you wish to have read from the record, come in
21 and defendant can make an objection and the Court rules on
22 it.

23 MS. OGUNKEYEDE: As we approach the hearing next
24 week, Your Honor, and the documents that are relevant to this
25 current argument come before the Court, we may seek leave to

1 renew this argument solely for the sake of keeping time of
2 the Court, reviewing document after document, at a minimum.

3 THE COURT: Well, you know, I don't understand.
4 Whose fault is it -- if this is a problem, whose fault is it
5 from the Court's standpoint that we're in this position? It
6 would be the plaintiffs. You're the one that wants the
7 evidence to be admitted and the defendant doesn't. They've
8 got their side of the case. They don't have to agree. Maybe
9 they should have agreed. I don't know. But I'm not in a
10 position to decide, you know, who's right or wrong in this
11 thing. When you can't get the plaintiff to agree, you
12 summons everybody and his brother who you need to get your
13 evidence admitted.

14 MS. OGUNKEYEDE: Noted, Your Honor.

15 If needs be, we will reach out to the defendants as
16 to supplementing our witness list at this point.

17 THE COURT: Okay.

18 MS. GRIGGS: Good afternoon, Your Honor. Ruth Griggs
19 from Sands Anderson, on behalf of the VDOC defendants, Your
20 Honor. I believe we're next on your list for the motion
21 regarding Dr. Greifinger.

22 As an initial matter, Your Honor, it's my
23 understanding from plaintiffs' brief and response that one of
24 the issues has been resolved. I understand their opposition
25 memorandum -- that they have agreed to withdraw

1 Dr. Greifinger's opinions and testimony regarding Sherry
2 Richburg. I won't argue that because that matter has been
3 resolved.

4 I'm mindful of the Court's notes in the order sent
5 regarding the qualifications of Dr. Greifinger, so I will
6 address those for only a moment.

7 In their opposition brief and repeatedly throughout
8 documents that have been submitted by Dr. Greifinger and his
9 articulations at his deposition, he continually maintains
10 that he has been engaged for 30 years in the practice of
11 correctional medicine. Yesterday, we submitted to the Court
12 the language from the laws of the State of New York regarding
13 what constitutes the practice of medicine. We used New York
14 State laws because we also submitted the affidavit by
15 Dr. Greifinger where he acknowledged that he is licensed by
16 the State of New York. There is no way, based on the
17 information he has provided, that he is, in fact, engaged in
18 the practice of medicine.

19 We recognize that the gatekeeping role in a bench
20 trial is different from the gatekeeping role in a jury trial.
21 It might be more appropriate for me to say, in terms of a
22 qualification question, that we believe none of the opinions
23 he seeks to offer in this case can be -- should even be
24 considered by the Court, given his lack of qualification. I
25 would say that's because this is the practice of medicine.

1 Dr. Greifinger, based on his representation, possibly
2 practiced medicine for a total of 14 years. He has been not
3 practicing medicine for 23. He never practiced medicine in a
4 correctional facility in the last 30 years -- and the
5 practice of medicine is so evolving and so constant. I know
6 that the statutes for the Commonwealth of Virginia for
7 qualification of an expert don't apply, but I think they're
8 particularly instructive in this case because the
9 Commonwealth has recognized that someone who's done the
10 procedure at issue as we refer to it in Virginia, 5 and
11 10 years ago, may have no knowledge of how it's done today.
12 Therefore, their opinion is not considered valid. We would
13 argue that would be the case for Dr. Greifinger.

14 He has, in his deposition, as we noted in our brief,
15 specifically acknowledged that he hasn't treated some of the
16 illnesses he wants to talk about; for example, Viviana
17 Anselme, who has Takayasu's arteritis. He said flat out in
18 his deposition he has never treated that. He wants to opine
19 regarding Viviana Anselme that she should have been placed
20 immediately on methotrexate, While he acknowledges that there
21 are other treatments that could be proper, and he doesn't
22 know if she's on any better treatments that could be proper,
23 and he doesn't know the side effects of methotrexate. These
24 are things that are outside the scope of his knowledge by
25 virtue of the fact he has not engaged in the practice of

1 medicine for 23 years.

2 So our qualification question takes two parts, Your
3 Honor. We believe wholly he is not qualified for these
4 opinions, but should the Court allow Dr. Greifinger to come
5 to speak on his opinions in this case, we would say that they
6 should be narrowly tailored, where we would argue he cannot
7 offer an opinion about the appropriate way to treat a woman
8 who has an illness he's never in his professional career
9 treated. It's just not possible he's qualified to render an
10 opinion on those things he's never treated.

11 Regarding some of the other cases -- and I'm mindful
12 of the discussion the Court just had about deliberate
13 indifference and the standard to be applied. In the case of
14 Ashely Carr, who's one of the inmates that Dr. Greifinger
15 seeks to opine about, he talks about whether or not the --
16 she had a hearing loss and apparently did not show up for an
17 appointment to check whether she was suffering from an actual
18 hearing loss and/or needed any type of equipment to
19 facilitate her needs. Dr. Greifinger's opinion is VDOC had
20 to follow up with her to make sure she didn't show up for
21 that appointment simply because she didn't hear her name
22 called. He acknowledged he has no idea whether that is a
23 factor in the case, that she didn't show up because her name
24 was called. He just speculates that if her name was not
25 called -- if she didn't hear her name being called, then she

1 has suffered some injury. But he has no idea whether that
2 has happened in any event.

3 He similarly discusses grievances of four women.
4 They were emergency grievances that were filed. And he says
5 if to the extent -- and he qualifies his own opinions. He
6 says to the extent these women were left in harm's way on
7 purpose by the way that these emergency grievances were
8 answered, this is unacceptable. He has no idea if, in fact,
9 based on his own deposition testimony, any of these women
10 were ever in harm's way, let alone allowed to remain in
11 harm's way based on the response that was made. He did not
12 look at any of their records. He has no idea whether the
13 nurse who responded to the emergency grievances looked at
14 their records, and basically said in his deposition, I don't
15 care. I just think the language that they used is mean to the
16 extent that these women were allowed to stay in harm's way
17 for an extended period of time, based on the response of
18 these women.

19 That can't be the standard for admissibility, Your
20 Honor, to say simply that because Dr. Greifinger thinks
21 something was mean, that that constitutes deliberate
22 indifference.

23 I'd like to return just briefly to the conversation
24 that the Court was having earlier regarding how you're going
25 to be looking at this case, Your Honor.

1 If we look at the standards in the settlement
2 agreement, if they were criminal law, they would be
3 unenforceable because they are so broad and vague, no one
4 could really tell what action violates any of those.

5 For example, you look at the standards for staffing.
6 To say that you must have sufficient staffing to timely
7 provide care doesn't tell anyone what's that threshold limit
8 that requires you to provide certain care and treatment. We
9 would argue that you have to go from the standards, which are
10 articulated beginning on page 8 of the settlement agreement,
11 back to page 6, which specifically articulates that those
12 standards are developed to achieve constitutionally adequate
13 medical care so that when Dr. Scharff is coming to look and
14 evaluate --

15 THE COURT: What is "constitutionally adequate
16 medical care"?

17 MS. GRIGGS: Well, that's part of what Dr. Scharff is
18 tasked with doing, Your Honor, because these are so vague
19 that on their face, they don't provide --

20 THE COURT: Why did you all agree to them?

21 MS. GRIGGS: Your Honor, we agreed to them in the
22 context of the paragraph on page 6 which says: These
23 standards are designed to move towards constitutionally
24 adequate --

25 THE COURT: You mean, there's no doctor, anybody in

1 the prison system, who can tell what's adequate staffing,
2 nursing staff?

3 MS. GRIGGS: We absolutely maintain that they did,
4 Your Honor, and that they're doing that at this time, and we
5 maintain that's what our expert, Jim Welch, looked at when he
6 was there. He looked at the staffing service, and he said,
7 What services are you offering? How do you intend to offer
8 them? And let me see the staff that you intend to put
9 forward to get that done, and I'll see if I believe that
10 that's consistent with the requirements of the settlement
11 agreement. That's what Dr. Scharff does to a certain degree,
12 Your Honor. VDOC has conversations with him when they have
13 questions about, What do you mean we need to do in this
14 direction? What do you mean we need to do in that direction?
15 But otherwise, those standards are very general, Your Honor.
16 To say something has to be done in a timely fashion doesn't
17 lay down a specific enough standard for someone to say, I
18 know enough by reading this exactly what I have to do. And
19 that's how these standards are distinguished from the cases
20 that were cited by the defendants out in California. In the
21 California cases, the standards are very explicit, Your
22 Honor. They say, if people have been judged to have -- need
23 a certain type of consult, they must go out within 24 hours.
24 If these people have been found to need this type of consult,
25 they must go out in 14 days. Those are explicit standards.

1 THE COURT: Y'all really put one over on the
2 plaintiff. Y'all got all this stuff that means nothing. Is
3 that what you're saying?

4 MS. GRIGGS: We believe it means that you have to
5 look at each of these in terms of the context of
6 constitutionally adequate care, and that that's an evolving
7 process that goes along with Dr. Scharff. And the reason we
8 say that, Your Honor, is because the settlement agreement
9 specifically directs Dr. Scharff to come up with some of
10 these standards. Even though it says be implemented, it
11 sends the contract monitor off to create a measuring
12 mechanism, so it acknowledges that is not there in the
13 standards and settlement agreement and that Dr. Scharff will
14 have to create that; and he has, over time, created it. I
15 confess I don't possess a copy of it. We have looked to see
16 if we can get exactly what it is Dr. Scharff is monitoring;
17 but the settlement agreement specifically acknowledges its
18 own vagueness and sends him off to set those standards.
19 That's why we believe you can't just say, I looked at an
20 emergency grievance form and I thought the language was mean
21 and that means you're in violation of the settlement
22 agreement, without something more than that, Your Honor.
23 There has to be --

24 THE COURT: What did Dr. Scharff say anything about
25 -- did he establish what the nursing -- what was adequate

1 nursing care?

2 MS. GRIGGS: I believe he's established it.
3 Actually, he has, Your Honor. He has looked at it in
4 conjunction with Fluvanna over time as they've worked on
5 things to get people in. He has pointed out things that he
6 thought they would need help with, and these will be
7 discussed, Your Honor, with -- the absence of a medical
8 director is something he raised over time. And he talked
9 about senior staffing. Over time, they have worked with Dr.
10 Scharff to find out what does he think is needed and how will
11 we get to there. Those are clearly not in the settlement
12 agreement on day one. The settlement agreement anticipates
13 that he will go out and create those, Your Honor. That was
14 his whole purpose to it.

15 So for purposes of Dr. Greifinger, Your Honor, his
16 opinions, these vague opinions that have no basis of fact,
17 other than he thinks things sound mean, but he's never
18 actually investigated whether there was any risk of harm to
19 anyone, can't possibly be admissible opinions such as the
20 ones that he offers about some of the ladies that filed
21 emergency grievances.

22 We would also offer, Your Honor, as we noted in our
23 record that unlike the providers at Fluvanna who send a lot
24 of these women out for specialty treatment, Viviana Anselme
25 being one of them -- and he acknowledges she goes out for

1 specialized treatment to a rheumatologist. He, nonetheless,
2 as a man with a pediatrics background, who has not provided
3 care in a correctional facility for a few years, feels that
4 he can opine about what's the correct care for a woman who he
5 acknowledges needs to be sent out of Fluvanna to see a
6 specialist. How can he maintain both of those opinions in
7 the same report and be offering an opinion that's consistent
8 and available to this Court to consider?

9 The other point that we made in our record is that
10 Dr. Greifinger repeatedly claims that the defendants are
11 breaching standards of care. That's not the standard that's
12 applicable here, Your Honor; that's a negligence standard. A
13 negligence discussion is a discussion for another day. The
14 key here is deliberate indifference. And I would offer, to
15 the extent he's explicitly stating standard of care, we know
16 that's inconsistent with what the settlement agreement
17 directs as the appropriate standards for measuring whether
18 people are in compliance or not. And he repeatedly says that
19 about their morbidity and mortality reports: These are
20 noting deviations from the standard of care. We don't
21 acknowledge that that's what they're noting; but to the
22 extent that's his opinion, that's not an opinion that's valid
23 in this context because this is a context that's concerned
24 with the constitutionally deficient healthcare. Are they
25 providing constitutionally deficient healthcare?

1 So we would maintain any opinions that discuss
2 breaches of the standard of care are not relevant, not
3 helpful to the Court, given the ultimate inquiry is: Are
4 they providing constitutionally adequate care?

5 THE COURT: You say. "Constitutionally adequate
6 care," but really, it seems like what you're saying is: We
7 don't have to provide anything except other than to be -- not
8 to be deliberately indifferent.

9 MS. GRIGGS: I'm glad the Court brought that up. We
10 absolutely do not maintain that.

11 THE COURT: That's the way it sounds.

12 MS. GRIGGS: No, no. We're saying to the extent that
13 they're going to say we're breaching the settlement
14 agreement, that's the standard. That's not the burden we
15 place on ourselves.

16 You will hear from Dr. Stephen Herrick, who's one of
17 the highest-ranking people at VDOC associated with overseeing
18 this process, and he will tell you they are striving for
19 greatness, Your Honor. But they're humans. Are there going
20 to be things that go awry? There absolutely are going to be
21 things that go awry. But they are striving for greatness.
22 The issue, though, is: To find them in violation of the
23 settlement agreement, there needs to be constitutionally
24 inadequate healthcare.

25 The other issue that we raised in our motion, Your

1 Honor, is that almost two weeks late and on the last day of
2 identification of exhibits and witnesses, Dr. Greifinger
3 provided a rebuttal report. The rules are clear about
4 whether a rebuttal report should be provided. Plaintiffs
5 say, well, there was no specific notation in the order as to
6 when rebuttal opinions must be provided. Then the rules
7 would provide the guidance. And the rules say that a
8 rebuttal opinion must be provided within 30 days of the
9 opinions it's designated to rebut. This was not timely
10 provided. It discussed all new women. They were not women
11 discussed -- whose care was discussed in any detail in our
12 initial expert report, Your Honor. And it was at a time
13 when, A, we were out of time to identify any other experts
14 that could respond to these because it was the last day for
15 identification of exhibits and witnesses, and we could not
16 have submitted additional reports; and B, it was provided
17 only -- less than three weeks before the start of this trial
18 when we finally got his rebuttal opinions, Your Honor. So we
19 would ask they be stricken as untimely so that he cannot
20 provide them in this case.

21 I'll undertake any questions the Court has.

22 THE COURT: Okay.

23 MR. HOWARD: Good afternoon, Your Honor. Ted Howard
24 for the plaintiffs.

25 Your Honor, with regard to Dr. Greifinger, I'm sure

1 that you will recall that in ruling on both the motion for
2 class certification, which was granted, and in ruling on the
3 parties' cross-motions for summary judgment, in which the
4 Court denied the defendants' motion in its entirety and
5 granted the plaintiffs' motion with respect to two threshold
6 issues, that in both of those opinions, the Court made
7 reference to and, in effect, credited the opinions of
8 Dr. Greifinger as an appropriate expert for the plaintiffs
9 with regard to the area of medical care in the correctional
10 setting. The idea that Dr. Greifinger, because he hasn't
11 specifically laid hands on a particular patient in a
12 correctional facility in a while, is not somehow qualified
13 within the parameters of Rule 702, contemplating knowledge,
14 training and experience, et cetera, I don't want to be
15 disrespectful, but we, frankly, find that to be absurd.

16 Dr. Greifinger has been the consultant for the
17 Department of Justice with regard to correctional medical
18 issues. He has been the consultant with regard to the
19 Department of Homeland Security Office of Civil Rights and
20 Civil Liberties with regard to medical care in correctional
21 settings. He is currently the court-appointed monitor for
22 Miami Dade County Jail, for Orleans Parish Jail in New
23 Orleans, and for the Albuquerque Metropolitan Correctional
24 Facility. Quarterly, he goes to these various facilities.
25 He interacts with the court. He undertakes investigations

1 with regard to the way the care is being provided with
2 respect to the same sorts of issues that are involved in this
3 case. And he has been doing it for quite some time to the
4 satisfaction of your counterparts on the federal bench in a
5 number of jurisdictions. So we would respectfully submit
6 that he is imminently qualified to provide opinions in this
7 case with respect to the issues he will be addressing.

8 Secondly, Your Honor, we object quite strenuously to
9 this collateral attack on the settlement agreement. Your
10 Honor knows better than any of us on the basis of the
11 two-and-a-half years of proceedings that went before the
12 settlement agreement how seriously the concerns were with
13 regard to the medical care at Fluvanna to the point of
14 holding, quote, In the findings of facts supporting the final
15 order. Plaintiffs have presented ample evidence in their
16 filings enabling a factfinder to reasonably conclude that the
17 VDOC defendants are or have been deliberately indifferent to
18 the serious medical needs of the plaintiffs' class. Although
19 the case did not proceed to trial and was never fully decided
20 on the merits, the voluminous evidence supplied by the
21 plaintiffs over four years of litigation would have been
22 sufficient to prove an actual violation of the plaintiffs'
23 Eighth Amendment rights.

24 That is the context in which this settlement
25 agreement was negotiated and entered into on a consensual

1 basis by the Virginia Department of Corrections, with full
2 knowledge and understanding that the elements of the
3 settlement agreement would embody the constitutional standard
4 of care. So to have them now running away from their own
5 settlement agreement, in effect, saying, Oh, well, you still
6 have to prove deliberate indifference de novo -- that's not
7 the way it works. That's what the settlement agreement did.
8 It essentially replaced the obligation to have to show on a
9 case-by-case basis deliberate indifference.

10 Thirdly, Your Honor, with regard to Dr. Greifinger's
11 opinions concerning the treatment of particular women that he
12 used to illustrate his broader opinions that things have not
13 changed nearly as much as the defendants would like to
14 portray in terms of the care at Fluvanna, it's not just
15 specific injuries relating to particular care or lack of
16 care. Helling v. McKinney, which has been cited frequently
17 in the papers over the course of this entire litigation,
18 makes it clear from the perspective of the U.S. Supreme Court
19 that it's not just harm but also a substantial risk of
20 serious harm that violates the Eighth Amendment. So when Dr.
21 Greifinger looks at the response to an emergency grievance
22 asserting a serious problem, and he finds the response
23 deficient because it just dismisses the fact that the woman
24 is claiming an emergency, that is presenting to her a
25 substantial risk of serious harm; and that is the point of

1 his illustrative paragraphs in both his initial report and
2 his rebuttal report. And we're quite confident of Your
3 Honor's capacity to determine what weight to give those
4 opinions, but they don't go to admissibility.

5 When he talks about breaching standards of care, he's
6 talking about the standards in the settlement agreement, and
7 that goes back to my point of a minute ago. He's not talking
8 about a negligence standard that would apply in a state court
9 proceeding concerning medical malpractice.

10 Finally, with regard to the rebuttal, Your Honor, as
11 you will hear, to the extent that the witnesses are all
12 permitted to testify, the experts on both sides, you'll hear
13 from the defense witnesses, A, that they didn't look back
14 very far beyond March of 2018 to determine what the problems
15 were prior to that time; and secondly, they regard things
16 since March, 2018, to be up to standard as they define it.

17 And so in order to provide a response to the sort of
18 general clean bill of health, if you will, that the
19 defendants' experts are giving the facility at this point,
20 Dr. Greifinger has pointed out, A, shortcomings within the
21 opinions of the defendants; and B, illustrations from March,
22 2018, forward in regard to particular women that we believe
23 illustrate that things are not all well and good at Fluvanna.
24 And we believe the rebuttal report should be accepted.

25 Thank you.

1 MS. GRIGGS: Thank you, Your Honor.

2 As an initial matter, regarding whether
3 Dr. Greifinger has been credited by other federal courts, we
4 provided as an exhibit to our reply brief yesterday, a copy
5 of his affidavit in this case. I would postulate that he has
6 undoubtedly represented to those courts as he has to this one
7 that he is engaged in the practice of correctional medicine,
8 and I believe the statute we provided from the State of New
9 York makes it clear that's a misrepresentation. To the
10 extent he's been credited by other courts based on that
11 misrepresentation, that's an issue that needs to be
12 considered by those other courts.

13 Secondly, Your Honor, regarding the issue of the
14 collateral attack on the settlement agreement, I ask the
15 Court to take notice of page 47 of plaintiffs' bench brief in
16 this matter. Plaintiffs are asking for changes to the
17 settlement agreement, Your Honor. So we're not -- to the
18 extent we are, quote/unquote, making collateral attacks on
19 the settlement agreement, they are as well. They want it
20 changed in their bench brief. They have said if they get the
21 remedy that they wish, the defendant shall convene within 15
22 calendar days of this order a collaborative meeting with the
23 plaintiffs and selective healthcare experts and come up with
24 more specific standards for the provision of healthcare at
25 the Fluvanna Correctional Center for Women on the topics

1 below, which are all the topics in the settlement agreement.
2 So they are essentially rearming what we have just said,
3 which is they are so general right now that they are not
4 self-executing. It's not possible to say that you can look
5 at these and say I understand the behavior that is required
6 of me. They are acknowledging that in their bench brief,
7 Your Honor. So to the extent we are being accused of a
8 collateral attack on the settlement agreement, they are
9 making it as well.

10 Third, Your Honor, what our experts have advocated,
11 we have advocated to subject ourselves to a national
12 recognized standard for correctional healthcare; namely, the
13 NCCHC standards. And I apologize because I cannot remember
14 exactly what that acronym stands for, but it is a nationally
15 recognized standard that even Dr. Greifinger, plaintiffs'
16 expert, says it's a great standard for measuring the quality
17 of correctional healthcare. We have said because of the lack
18 of specificity in these standards and because of this
19 continual push back about what exactly constitutes a breach
20 of these standards, why don't we adopt the national standards
21 that have been applied all over the country that
22 Dr. Greifinger is familiar with, that both our experts are
23 familiar with, and use those as a measure and strive to
24 accomplish that measurement so we all know what it is that
25 we're actually trying to achieve here?

1 Plaintiffs have said the experts for the defendants
2 have decided to look for March 1st on, and not look back at
3 all. Your Honor, we ask that you look at Dr. Greifinger's
4 report and also Nurse Clark's report for the plaintiffs.
5 Several of the ladies' care that Dr. Greifinger addressed in
6 his report has occurred after the date that they say is
7 relevant; namely, September of 2017. Lots of that care is
8 after that period of time. I think virtually his entire
9 rebuttal opinions address only care after that period of time
10 and would be inadmissible under their theory that that's not
11 a relevant period of time for care. So to the extent he
12 complains that our experts address what is happening now or
13 has been happening in recent months, the same is true for the
14 experts for the plaintiffs, Your Honor.

15 We are not running away from the settlement
16 agreement. We are seeking clarity. As I said before, this
17 is a facility that is striving for greatness, acknowledging
18 that's not going to happen in a minute, that's not going to
19 happen in a day, that's not going to happen in a week. We
20 don't believe the settlement agreement anticipated it would
21 happen in a week as well, but we are by no means not taking
22 this seriously or striving to make this happen, Your Honor.

23 THE COURT: I think the witness -- certainly, he's an
24 expert, so I think most of the objections go more to the
25 weight to be given to his testimony than through its

1 admissibility. I would say that these probably not -- I do
2 take the rebuttal report as being untimely seriously, and he
3 shouldn't be discussing patients brought up -- new patients
4 brought up on rebuttal.

5 I think I'm going to allow him to testify, but you
6 can make objections during his testimony that are more
7 specific.

8 MS. GRIGGS: Thank you, Your Honor.

9 THE COURT: What's next?

10 Generally, I don't think a doctor has to necessarily
11 have treated every disease, just -- I think it's not that
12 great a high standard. If you're a medical doctor, you might
13 -- you can testify rather broadly about medical diseases and
14 things. It goes to the weight more than to the actual
15 admissibility of the evidence.

16 MS. GRIGGS: Thank you, Your Honor.

17 We will have Dr. Gable, who's the medical director
18 there, and he will come and speak on a variety of illnesses.

19 MS. CASTANEDA: Your Honor, I'm Brenda Castaneda with
20 the plaintiffs. I'm the next item on the Court's order, the
21 motion -- plaintiffs' motion to strike Scott Dodrill as an
22 expert for the defendants, and I'm going to argue that.

23 As this Court knows and as this Court has held in
24 other opinions where it was judging Daubert matters, Daubert
25 requires the opinions rendered by experts be reliable and

1 relevant. Kumho Tire obviously extends that to other types
2 of experts beyond scientific experts and the Fourth Circuit
3 has said the qualification should be liberally judged. Of
4 course, Rule 702 is the guiding principle here and it
5 requires the expert's scientific, technical or other
6 specialized knowledge will help the trier of fact to
7 understand the evidence or determine a fact in issue; the
8 testimony is based on sufficient facts or data; the testimony
9 is the product of reliable principles and methods; and the
10 expert has reliably applied the principles and methods to the
11 facts of the case.

12 So plaintiffs here are not challenging all of those
13 elements. Plaintiffs are not challenging, for example, that
14 Mr. Dodrill has some kind of specialized knowledge through
15 experience and through running prisons. I think he's run
16 both federal and state prisons so that is not at issue here.
17 What is at issue in terms of Mr. Dodrill's opinions is
18 whether he actually applies the facts, applies methods or
19 knowledge to the facts of the case in a way that will help
20 the trier of fact -- the Court in this case -- to understand
21 the evidence or to determine a fact in issue.

22 Now, Mr. Dodrill's report contains what he lists as
23 six different opinions that he plans to testify to in court.
24 Opinion one is that corrections and all of its components are
25 interdependent of each other -- and I'm paraphrasing and this

1 is in his report.

2 Now, it's plaintiffs' contention that that opinion is
3 not based on sufficient facts or data. In fact, in his
4 deposition he stated that that opinion is based on his
5 experience and knowledge of how prisons work. It was not
6 based on any specific document in this case and it's not
7 actually tied to any facts of the case. So under ePlus v.
8 Lawson, the Eastern District of Virginia quoting Kumho Tire,
9 says that nothing in Daubert or in the Federal Rules of
10 Evidence requires the district court to admit opinion
11 evidence that is connected to existing data only by the ipse
12 dixit of the expert. In other words, it is so because I say
13 it's so.

14 In this case, that opinion is, I think, classic ipse
15 dixit and it's just like saying components of corrections are
16 interpolated. There's nothing tying it to the facts of this
17 case and, thus, it's not relevant.

18 Two, he states that all the medical trips are
19 scheduled expeditiously. In his testimony, deposition
20 testimony, on page 27, he says this conclusion is based on
21 Ms. Shifflett's logs; she's an employee at the prison. No
22 other documents. He talked to the warden. He talked to
23 Lt. Burroughs, who both said security doesn't cancel trips.
24 So again, in this case, he admits that he didn't investigate
25 any of the underlying causes as to why somebody might have

1 been listed as a refusal for transport. When asked if he had
2 reviewed the adequacy of staffing for transport, he just said
3 that he talked to Lt. Burroughs. And so in this case, there
4 is nothing in this opinion that requires the application of
5 any specialized facts or knowledge. He's merely repeating
6 that medical trips, based on him talking to employees at the
7 prison, are scheduled expeditiously. Thus, it's not relevant
8 to the case because it will not help the trier of fact
9 understand the evidence or determine a fact in issue by
10 application of his particular knowledge or expertise. He's
11 merely restating what some fact witnesses could come in and
12 testify to if the defendants wish to put those witnesses on.

13 Third opinion is that all the medical grievances are
14 receiving response. Likewise, he bases this opinion on the
15 triage program as explained to him by people at the prison;
16 namely, Mr. Wilkinson, who's an employee who I believe has
17 now left the prison. He states in his testimony that he
18 reviewed six to eight grievances; that's page 61 of his
19 deposition. But he's aware there's thousands of grievances.
20 He also did not list any of those grievances he allegedly
21 reviewed on his list of materials in his opinion.

22 So again, whether medical grievances are receiving
23 response is something that does not require or does not
24 utilize Mr. Dodrill's expertise in order to inform the Court
25 about that, and thus it's not an element that will help the

1 trier of fact understand a fact or determine a fact in
2 evidence. Therefore, it's irrelevant under the Daubert
3 standard.

4 Under opinion four, he says correctional staff are
5 not violating the privacy rights of prisoners. The
6 plaintiffs have argued that he is impermissibly applying or
7 opining on a legal standard that's really up to the Court to
8 determine whether privacy rights are violated. Furthermore,
9 his testimony is not based on sufficient facts or data. On
10 page 86 of the deposition, he says the basis for this opinion
11 is his experiences, that he talked to Lt. Burroughs about the
12 transportation, he read the policies on transportation and he
13 said he knows how transportation works because of his
14 experience. He admits he didn't go on any trips at Fluvanna,
15 and he admits he's basing the opinion on page 88 that that's
16 the way it's supposed to be and that he's assuming they're
17 following their policies. Thus, he's, again, not basing that
18 testimony or that opinion on sufficient facts or data, and
19 it's not something that will help the Court to understand the
20 evidence in this case.

21 Fifth, he says that correctional staff are not making
22 medical decisions. He says on page 94 of his deposition that
23 that's not based on any documents, although he did read the
24 plaintiffs' expert Jackie Clark's report with regard to
25 security decisions. He says he talked to staff, either

1 Ms. Shifflett or Mr. Ong in the infirmary unit about how
2 things were going. And so, again, this testimony is not
3 based on sufficient facts or data and in fact, he testified
4 in his deposition there was a question -- so you're forming
5 an opinion about Fluvanna based on an understanding of how
6 you believe it works at another facility? He goes on to
7 answer: I'm putting Fluvanna in with the other institutions.

8 So, again, this is not an opinion that's based on
9 sufficient facts or testimony -- I'm sorry -- sufficient
10 facts or data and, therefore, it's not something that's going
11 to be relevant to help the Court decide the evidence or
12 determine a fact in issue.

13 Lastly, his sixth opinion is that FCCW meets the
14 mandatory accreditation requirements accorded by the ACA.
15 Again, he stated in his deposition at page 108, that's just
16 based on the ACA certificates and the reports of the ACA that
17 accompany those audits. Again, he's merely stating a fact.
18 Fluvanna has been accredited by the ACA. It was accredited
19 before this lawsuit was instituted in 2012, and it's not a
20 fact or opinion that is going to assist the Court in
21 determining the evidence or determining a fact in issue.

22 So in summary, none of -- Mr. Dodrill may have
23 experience in corrections; none of the opinions he's offered
24 in this case in his report are things that are going to help
25 the trier of fact understand the evidence, and furthermore,

1 his opinions are not based on sufficient facts or data.

2 MR. SCHNETZLER: Good afternoon, Your Honor. May it
3 please the Court. Nathan Schnetzler from the law firm of
4 Frith Anderson & Peake in Roanoke on behalf of the
5 defendants.

6 Your Honor, Scott Dodrill has been offered as an
7 experiential expert in the field of correctional operations
8 in this case. The relevance of that information is key.
9 This is a case about operating a prison, and Mr. Dodrill's
10 experience, from what I've just heard, is not being
11 challenged. His qualifications as an expert in the
12 operations of a correctional institution are not being
13 challenged by the plaintiffs. That's important for the
14 Court's analysis, given plaintiffs' motion to exclude him,
15 because as an experiential expert, the analysis under Daubert
16 is, as the courts have said, opaque. It's a little bit
17 nebulous. All the factors may not particularly come into
18 play and the Court needs to take into account how the expert
19 is using his experiences and whether or not those experiences
20 are being applied to reliable principles and reliable
21 methods. Given that how important the experience is of the
22 expert -- for an experiential expert on the Rule 702, it's
23 important for the Court to consider Mr. Dodrill's experience.
24 He has amazing experience or -- excuse me -- an astounding
25 amount of experience with correctional institutions. He

1 started out as a corrections officer with the Federal Bureau
2 of Prisons and worked his way up to become assistant warden.
3 Afterwards, promoted eventually to the warden of Lewisburg
4 and also served as a warden at Butner.

5 So, Your Honor, I don't think -- with that, he has a
6 significant amount of direct interaction both with offenders
7 as well as managing those offenders as well as dealing with
8 correctional staff and policies and procedures within a
9 correctional institution.

10 After that tenure as a warden, he was then promoted
11 to become a regional director being over several Federal
12 Bureau of Prisons correctional facilities and eventually
13 promoted to the assistant director of programs within the
14 Bureau of Prisons.

15 So it's with that experience that it's important for
16 the analysis here to understand how he is applying that
17 experience to the experience his investigation -- or visits
18 to Fluvanna Correctional Center For Women, to understand how
19 he is coming to his opinions.

20 Your Honor, I will address this a little bit out of
21 order. I know that the plaintiffs on brief addressed the
22 relevance issue after addressing whether or not the
23 principles and methods are reliable, but I think the Court
24 needs to make a determination that it's relevant before
25 getting into his principles and methods. As I've said, the

1 subject matters of operations of corrections are not within
2 the common knowledge of jurors, and I think the courts have
3 been pretty clear that they have left to the expertise of
4 correctional administrators how to operate prisons. What may
5 seem innocuous to a lay person may actually present a
6 significant security concern in the context of a prison
7 facility. So it is important; it is relevant to this case to
8 understand how a gentleman with a significant amount of
9 experience in operating -- dealing with security issues
10 inside of a correctional facility would look at those issues,
11 how they impact every single piece and component of the
12 day-to-day life inside of a prison facility.

13 So, Your Honor, we would submit that this is
14 absolutely relevant and it's absolutely helpful to the Court,
15 particularly given that we are here on a bench trial and the
16 gatekeeping function is a little bit less onerous, given the
17 Court can make its own determination whether or not to accept
18 the testimony or not of Mr. Dodrill.

19 That brings us then, Your Honor, into whether or not
20 Mr. Dodrill's principles or methods are reliable. Again,
21 because this is an experiential expert, you have to look at
22 this in a different lens than you would a traditional
23 scientific expert or engineer, a specialized doctor. In
24 fact, we have to look at how he's applying his experiences to
25 the principles that he sets forth in his opinions and the

1 methods he's using.

2 The principles, Your Honor, are that security is of
3 paramount concern inside of a correctional facility. It is
4 interwoven with every piece of every bit of operations within
5 the institution. It's not, just as he says -- it's not just
6 the practice of medicine; it's the practice of correctional
7 medicine. It's not just education; it's correctional work.
8 It's not just work; it's correctional work. What that means
9 is that you need to consider how security issues may impact
10 some of the, what we would consider innocuous issues
11 regarding either the delivery of medical care, a person going
12 to the commissary. Having the additional knowledge of what
13 sort of issues may come to bear in those situations inside a
14 facility are very important.

15 The other principle, Your Honor, is that based on his
16 experiences, Fluvanna Correctional Center's policies and
17 procedures are following standard correctional policies,
18 based on his experiences with the Federal Bureau of Prisons
19 as well as working as a consultant, working with state and
20 international facilities, as he notes in his report, working
21 with hundreds of correctional institutions, and that these
22 are sound correctional practices in terms of the operations
23 of security inside the facility.

24 When you look into what he is basing his method on,
25 Your Honor, it's clear that he visited Fluvanna himself and

1 interviewed staff, spent quite a bit of time meeting with the
2 warden of Fluvanna, meeting with medical staff inside of
3 Fluvanna, looking at documents, looking at policies and
4 procedures that affect the operations of Fluvanna; so he has
5 done a significant amount of research and review of
6 information in order to make a determination in his opinion
7 whether or not Fluvanna is following sound correctional
8 practices.

9 When he -- what he has done is taking his review of
10 those materials, his reflection upon those interviews and
11 conversations with staff, and given his experience working
12 with other facilities, working with other corrections
13 officers, working with other offenders, making in his opinion
14 a determination of whether or not a facility is following
15 sound correctional practices. So what he knows about other
16 correctional facilities is how he is applying that experience
17 in coming to a determination.

18 So, Your Honor, with that, we note that in various
19 circumstances, the Fourth Circuit has allowed analogous
20 testimony in terms of drug code, experiential expert
21 testimony. We mentioned the shake and bake method of making
22 methamphetamine where law enforcement officers are allowed to
23 testify as experts, even though they're not giving scientific
24 technical knowledge regarding those issues. But also in some
25 of the cases cited by the plaintiffs -- particularly, I note

1 the case that was cited out of the District of Maryland --
2 and I apologize I don't have it in front of me at this
3 moment. But in that very case, Your Honor, one of the
4 parties was moving to exclude a proposed expert and the Court
5 denied the motion to exclude. The circumstances in that case
6 was the expert was being presented to opine on the cause of
7 basically what caused a pipe to freeze inside of the wall of
8 a building. The expert went, took a look, inspected the
9 site, determined what he thought, based on his experience in
10 the construction industry what should have been done, and
11 came up to an opinion based on his experience and then based
12 on his actual investigation of going to the site and seeing
13 for himself what was happening, and the Court deemed that was
14 admissible as an experiential expert testimony.

15 Your Honor, with that, we believe Mr. Dodrill is
16 absolutely qualified to testify in this matter. He is basing
17 his opinions on reliable principles and methods, and the
18 information is absolutely relevant to this case.

19 THE COURT: All right.

20 MS. CASTANEDA: Your Honor, while plaintiffs do not
21 contest that experts can be experts on the basis of their
22 experience, and that may be the case with Mr. Dodrill, that's
23 not where the Court's inquiry ends. As the Eastern District
24 found in the ePlus v. Lawson case, the Court still must
25 engage in inquiry as to whether the opinion is based on

1 sufficient facts and data and whether the application of any
2 principles or methods are reliable. And in that case, there
3 was a Dr. Mangum, who was doing some evaluations as to the
4 values of some royalties. It was an intellectual property
5 case, and the Court said that under the Supreme Court
6 precedent of Joyner and Kumho that nothing in the Federal
7 Rules of Evidence requires the Court to admit opinion
8 evidence that is connected to the existing data only by the
9 ipse dixit of the expert. Thus, it is a proper consideration
10 of the Court to consider what documents, what information Mr.
11 Dodrill relied upon in forming his opinions, if any.
12 Certainly, in the case of opinion No. 1, he admits he didn't
13 base it on anything but his experience, and then whether he's
14 connected that to the facts of the case -- connected his
15 experience or opinions or methods to the facts of the case
16 and whether that is an opinion that will help the Court
17 understand the evidence.

18 In the ePlus case, the Court said Mr. Mangum hadn't
19 fully -- didn't have a good explanation for how he had
20 calculated all these factors. They say that's quintessential
21 ipse dixit. It is so because the experts say it is so. It's
22 the plaintiffs' contention that's essentially what
23 Mr. Dodrill's opinions amount to. It is so because I say
24 it's so. Systems are interdependent because I say they're
25 interdependent. And that the other -- some of the other

1 opinions that he renders are simply restating of facts
2 without any application of opinion or method, such as
3 Fluvanna meets the ACA standards and that the Court's --
4 there's nothing about those opinions that will help the Court
5 understand the evidence in a way that it couldn't simply by
6 hearing from fact witnesses.

7 THE COURT: Well, he is an expert, I think, in
8 correctional medicine, and certainly his opinions on
9 constitutional rights and so forth, privacy matters, might
10 not be helpful to the Court, but -- this is a bench trial.
11 The rules are a little different. The jury is not going to
12 be contaminated by any of these opinions. The Court will
13 have to make findings of fact at the end of the case. To the
14 extent that the Court relies upon an expert's testimony, the
15 Court will have to explain why the Court relies upon that
16 testimony. It will have to be -- fit the Daubert test or the
17 Court cannot rely upon it.

18 So I think this is -- he will be permitted to
19 testify, and we'll sift it out when he does.

20 Let's take about a ten-minute recess.

21 (Recess at 3:07 p.m. to 3:18 p.m.)

22 I have Dr. Joshua next.

23 MR. HOWARD: Your Honor, if I may, just as a point of
24 clarification: At the end of your comments concerning
25 Dr. Greifinger, you made some statements about his rebuttal

1 report. I think we're a little bit unclear on whether it is
2 stricken or whether you will be, shall we say, open and
3 amenable to arguments by the defendants in connection with
4 any testimony he offers based on the rebuttal report.

5 THE COURT: The things he brings up in the rebuttal
6 are something that the defendant didn't have time or
7 opportunity to -- if it would be prejudicial, I don't think
8 it should be admitted.

9 MR. HOWARD: And you'll so rule at the time? Is that
10 fair?

11 THE COURT: Right. I would rule at that time.

12 I'm sorry. Sometimes I look at the screen when I
13 don't understand the question. When I'm looking away, I'm
14 looking at the realtime trying to be sure I understand.

15 MR. HOWARD: I understand.

16 Secondly, Your Honor, we are certainly listening with
17 great care to your commentary and we are open to the, at
18 least, implication of your comments that you're more inclined
19 to entertain challenges to the admissibility and/or relevance
20 of some of these experts' testimony in realtime at the trial
21 as opposed to ruling peremptorily today.

22 THE COURT: Basically, it looks to me they're all
23 marginally qualified, and it's a question of what weight to
24 give to their testimony. And if they have no basis for it,
25 obviously, you just exclude it all together.

1 MR. HOWARD: Yes, Your Honor.

2 We certainly do not want to unduly take up the
3 Court's time. We, as plaintiffs, on the plaintiffs' side,
4 would be prepared to address our concerns with regard to the
5 defendants' experts as to whom we haven't argued yet in the
6 context of our questioning at trial. Of course, that would
7 be subject to the understanding that the defendants would do
8 likewise.

9 THE COURT: I can't settle it for you.

10 MS. GRIGGS: Your Honor, we are happy to proceed in
11 that fashion for essentially 90 percent of all the arguments.

12 THE COURT: I would prefer to do that. It's much
13 easier.

14 MS. GRIGGS: There was only one issue that we were
15 hoping to take up with the Court today, and it has to do with
16 our ability to cross-examine a witness.

17 When RN Clark has an expert report, and the Court has
18 an opportunity to see that, and the report is laced with
19 "this patient, that patient, this patient, that patient" --
20 dozens of those. They are not identified; none of them
21 identified. We sent a deposition notice for her to bring the
22 documents upon which she relied to the deposition so we can
23 ask her about those patients. She could not identify any of
24 them at the deposition. The closest we got was someone that
25 she could say, It was one of the 14 women I met with at the

1 jail, but she couldn't tell us which one -- but she couldn't
2 tell us at all. There was one she thought was one of the 14,
3 and she later decided it wasn't. So we can't cross-examine
4 her on that. We don't know.

5 The other issues are she asserted violations of the
6 Virginia Code regarding nursing, Virginia Code regarding
7 pharmacy, and I believe it's one other section of the
8 Virginia Code and could not point out to any of those
9 sections, so we don't know what section she's saying we
10 violated. She didn't bring it with her. We gave multiple
11 breaks during her deposition to let her go look online and
12 find it; she never found it. She listed -- her list of
13 documents that she brought that she reviewed VDOC emails.
14 Your Honor, there have been maybe 30,000 pages of emails and
15 she didn't identify them anymore than to say, I reviewed VDOC
16 emails. She did not bring them with her to the deposition,
17 and could not identify them there. So our problem for
18 purposes of RN Clark is we can't prepare to cross-examine
19 her. We don't know her opinions. They're not identified in
20 a report. Granted, she will say, I talked to a patient and
21 they told me this, but she can't tell us who that patient is,
22 so we can't go through that patient's records. There are a
23 whole section where she lists six patients and says, I looked
24 at these records and this is what I found. But she can't
25 tell us who any of those patients are. So we can't look at

1 those records and we can't cross-examine her on that. It's
2 not a qualification issue. It's a prejudice to us that we
3 are unable to prepare to cross-examine her due to fundamental
4 deficiencies in her expert report, none of which she could
5 procure at her deposition.

6 As we stand here today, we do not know who these
7 women are, other than some of them were among the 14 she
8 talked to, and she can't tell us that. We can't look at
9 records. We can't prepare to a significant degree, Your
10 Honor, because we don't know who those people are. So that's
11 our problem with RN Clark.

12 We'll set aside the qualification issues we raised.
13 That's an impediment that impedes our ability to
14 cross-examine her.

15 MS. CASTANEDA: Your Honor, if I may just respond to
16 the representations about Nurse Clark.

17 I think there's no question that Ms. Clark is a
18 qualified expert. She's got many years of experience running
19 correctional -- healthcare for correctional facilities in
20 California, including at San Quentin. At Pelican Bay, she
21 currently runs healthcare for the County of LA, which is the
22 largest jail system in the country, including 18,000 inmates,
23 some of whom, due to California laws, are serving out
24 sentences as long as ten years. Ms. Clark is a expert on
25 nursing systems, systems of healthcare in correctional

1 facilities.

2 As to the allegations that defendants have been
3 unable to prepare, I believe those are not well taken.
4 Ms. Griggs and I engaged in an email exchange prior to --
5 several weeks prior to Ms. Clark's deposition with regard to
6 the patients referred to, which were patients that Ms. Clark
7 spoke with at her visit for which counsel for the defendants,
8 including Ms. Griggs and Ms. Abato, were present for the
9 entire visit. There was a list of prisoners with whom she
10 spoke that was provided before the visit, during the visit
11 and then also during our email exchange, and also at the
12 deposition, which was attached, as, I believe, Exhibit 3 or 4
13 to the deposition. So that's just not a point well taken.

14 There was one point in the report where she did refer
15 to a patient who was not identified by name. At that point,
16 she referred to some lines in her medical record and we had
17 already, before the deposition, agreed to withdraw those
18 lines, so that should be moot.

19 Then, it is clear from Ms. Clark's report that she is
20 an expert on systems of care, nursing systems, and that she
21 is able to draw on the evidence that she was able to
22 personally observe at the visit. For instance, she spoke --
23 Ms. Ellis with Ms. Cairns, who's one of the patients in the
24 infirmary, who's largely bedridden with MS. She was able to
25 speak with Ms. Cairns. Ms. Cairns, in her own de bene esse

1 deposition, has testified that it was cold in her room. Ms.
2 Clark felt Ms. Cairns's hands. They were cold to the touch.
3 She put her joints through passive range of motion and found
4 them stiff. The medical records of Ms. Cairns reflect the
5 nurses are not recording they're putting her through passive
6 range of motion to prevent her from losing range of motion in
7 her joints. So she has reviewed, for instance, the death
8 records. In her report she speaks about the records of Ms.
9 Johnson and Ms. Liberto and talks about how the failures in
10 nursing care -- for instance, LPNs not informing providers
11 about the condition of a patient -- can lead to systemic
12 failure and lead to substantial risk of harm, which is the
13 standard here.

14 I think that the plaintiffs just don't agree that the
15 defendants are unable to identify the patients with whom
16 Ms. Clark spoke. And again, this Court has indicated, and
17 you've said today, that, you know, you're going to consider
18 this evidence as it comes out at trial and, you know, the
19 Daubert qualifications of the various experts and incorporate
20 that into any ruling you may give. Plaintiffs are prepared
21 to abide by that.

22 THE COURT: Am I right these particular patients are
23 not going to testify?

24 MS. CASTANEDA: Some of them may. One of them has by
25 deposition in lieu of trial testimony already.

1 MS. GRIGGS: Just very briefly, Your Honor.

2 I was, in fact, at the facility that day, but Ms.
3 Abato and I, obviously, were not in the room when any of
4 these women spoke, so of those 14 women, we don't know what
5 any of them said. We brought them to the plaintiffs'
6 attorneys, they met with the expert, but we weren't
7 physically there. So we can't say of the issues that Nurse
8 Clark can say one of those 14 people told me. We don't know
9 about it either. We were not in the room. We're not
10 complaining. It's attorney/client.

11 The others, though -- there's six listed records and
12 she didn't even maintain that those are among those 14 women.
13 They could be any of the 1,200 women at Fluvanna, and she
14 couldn't tell us that. Similarly, she can't tell us what
15 portion of the Code of Virginia she's going to say we
16 violated. We're at a real loss what emails she claimed she
17 read.

18 Regarding inmate records she reviewed, she listed
19 45,000 pages without a single -- she later acknowledged she
20 didn't actually review 45,000 pages, but it's very difficult
21 to prepare for that, not knowing what any of these are, Your
22 Honor.

23 I think it's particularly egregious because we sent a
24 deposition notice that said, Please bring the documents you
25 relied on to the deposition so that maybe we could clarify it

1 there. She not only didn't bring them, but she could not
2 qualify it there.

3 I'm setting aside all the Daubert questions and just
4 saying we're hampered in our ability to cross-examine her,
5 given her inability to identify the individuals with whom she
6 spoke. She did acknowledge Alice Cairns, ultimately. Ms.
7 Liberto and Ms. Johnson discussed just now, this is the first
8 I've known of the two ladies whom she's going to discuss.
9 This is a limitation --

10 THE COURT: You have to establish hearsay that the
11 expert relies upon is that type of hearsay that other
12 similarly situated experts would rely upon in arriving at an
13 opinion, not just for a trial, but I guess in the ordinary
14 course of their --

15 MS. GRIGGS: Absolutely, Your Honor.

16 But the rule goes on to state, however, if queried,
17 we have a right to know what that hearsay is so that we can
18 challenge it. The expert can't testify to it on trial on
19 direct. However, they can be challenged on cross to say what
20 is the basis for it. We attempted to prepare for that by
21 challenging her at her deposition: Who is this patient with
22 whom you spoke that told you this?

23 I'll give you an example. One of the things she says
24 is the patients told me -- the ladies told me that the other
25 night there was a medical emergency where a woman attempted

1 to kill herself, and the nurses looked like Keystone Cops
2 when they came to take care of the emergency.

3 So I said to her, Do you know if the inmate with whom
4 you spoke personally saw this happen, or is she relating to
5 you information she got from another inmate?

6 I don't know.

7 Do you know who the inmate is that told you this in
8 the first place?

9 I don't know.

10 Do you know if it's three or four people removed from
11 the person who actually witnessed this thing happen?

12 I don't know.

13 I mean, it's kind of hard to get to the bottom of
14 that when we can't identify any of the people. I guess
15 that's to say she's basing this on experiential, which we've
16 heard a bit about. We can't test the experience because we
17 don't know if her entire opinion is based on inmates. We
18 want to know: Is this an inmate who actually has personal
19 knowledge or got it from another inmate, who got it from
20 another inmate, who got it from another inmate? I think
21 that's valid to say to the Court: Is that really the type of
22 information and expert that we can rely on?

23 And there were numerous circumstances like that where
24 we'd say, Who is this person who saw this, so we can even
25 find out if they have firsthand knowledge so we can bring to

1 the Court as a question -- this person couldn't possibly have
2 seen it.

3 And I will tell you, the place they said the suicide
4 attempt happened, the only one we know of that happened that
5 night did not happen where they say it happened. It was in a
6 different building than the building where Nurse Clark says
7 it happened. We're significantly hampered because we can't
8 get to the bottom of this and bring to the Court information
9 that says, This didn't happen.

10 This is not a prima facie and should be excluded
11 because we can't get to the bottom of that, Your Honor.

12 MS. CASTANEDA: Your Honor, if I may, I just want to
13 respond because I think there's been some representations
14 that are just not accurate.

15 As to the six listed women that Ms. Griggs says
16 weren't listed, in fact, those were all references to Ms.
17 Johnson and Ms. Liberto -- I did tell her that --

18 THE COURT: She gets the last word on this.

19 When this comes up, we'll treat this witness like the
20 others. Her testimony will have to fit, you know, within the
21 rules of evidence. She'll have to have a proper basis for
22 any opinion. If she's offering these things for the truth,
23 she'll have to have some pretty strong basis.

24 I take it she's just not going to recount a lot of
25 different incidents, is she? Is she coming up with an

1 opinion or what? What's her -- what is her opinion?

2 MS. CASTANEDA: Your Honor, Ms. Clark has a number of
3 opinions. She goes into depth in her report, in her rebuttal
4 report, about models of care. And in her testimony, she
5 talks about models of care in prisons. She talks about
6 nursing standards, whether the nurses she observed were
7 meeting nursing standards and whether the failure to meet
8 those standards can cause a risk of harm to the patients.

9 THE COURT: You answered my question.

10 I will give you the last word.

11 MS. GRIGGS: I think you've heard as much as you need
12 to hear from me, Your Honor. Thank you.

13 THE COURT: Anything else we need to take up now?

14 MS. CIOLFI: Yes, Your Honor. There are a couple
15 other matters on the order.

16 Were you referring to the experts? I think we have
17 agreed to move on from the experts; is that correct?

18 THE COURT: I think so.

19 MS. GRIGGS: Yes, Your Honor.

20 MS. CIOLFI: Your Honor, I believe the next thing on
21 the Court's order was the plaintiffs' motion to strike the
22 correspondence with the compliance monitor. If I may, my
23 name is Angela Ciolfi with the Legal Aid Justice Center, for
24 the plaintiffs.

25 The defendants seek to admit thousands of pages of

1 correspondence between the monitor, Dr. Scharff, and either
2 women at Fluvanna, the plaintiffs' attorneys or the medical
3 staff at Fluvanna. So in keeping with the Court's order, I
4 will spend my time today addressing the 402 and 403 issues.
5 But I would like to just note that the plaintiffs object on
6 the additional basis that compelling production and seeking
7 admission is not in keeping with the -- either the letter or
8 spirit of the settlement agreement provisions regarding ex
9 parte communications or the class notice, which indicated
10 that such communications would be confidential.

11 Turning to the relevancy and 403 issues; first, let
12 me address the correspondence between Dr. Scharff and the
13 women at Fluvanna. The evidence that defendants seek to
14 admit is voluminous. Exhibit 29 to the motion for summary
15 judgment, which is just one among many exhibits that
16 defendants seek to admit -- it, alone, is over 3,000 pages,
17 including 424 separate letters from almost 200 individual
18 women. Defendants say that these are relevant to show the
19 incredible number of unsubstantiated medical complaints
20 raised by the women. But these are only relevant if, in
21 fact, a significant proportion of the complaints turn out to
22 be wrong, and not just wrong, but so obviously wrong as to be
23 frivolous or malicious in their inception so as not to even
24 warrant any investigation. The only way to determine that is
25 for the Court to sift through all 424 complaints, possibly

1 accept extrinsic evidence, even expert evidence regarding
2 each complaint, and essentially to have a minitrial on each
3 of these complaints. Plaintiffs submit this is a needless
4 waste of time, especially when Dr. Scharff will be here to
5 testify and the defendants can simply ask him about the
6 number and volume and investigation of their complaints.

7 Defendants also say that these complaints somehow
8 undermine plaintiffs' claim that the grievance system is
9 ineffective. But the plaintiffs' claim about the grievance
10 system is not based on what the women say. It's based on the
11 defendants' grievance responses themselves and Dr. Scharff's
12 independent review of the grievance system and based on the
13 not fewer than 5 times over the course of nearly 16 months
14 that Dr. Scharff told the defendants to fix their grievance
15 system.

16 Similarly, the communications between Dr. Scharff and
17 the defendants' medical staff should be struck because they
18 are simply hearsay. Again, Dr. Scharff will be here to
19 testify and the defendants can call their own medical staff
20 to testify.

21 Finally, the communications with plaintiffs'
22 attorneys should be excluded because they are irrelevant.
23 Our opinions, as much as we strongly hold them, are simply
24 not -- about whether the settlement agreement has been
25 violated are simply not relevant. Ultimately, the only

1 opinion that really matters about that is the Court's. To
2 the extent that the Dr. Scharff's opinions are relevant, the
3 defendants are entitled to ask him about those on the stand.

4 The defendants have offered no case law to support
5 the position or the notion that the conduct of the lawyers
6 has any relevance whatsoever to this contempt action. The
7 case they do cite, Chesapeake Bank v. Berger, merely says
8 that the defendant in that case, a contempt action, was an
9 attorney; and that because of that, the Court did not find
10 credible his protestation that he did not understand the
11 Court's order. The case just simply doesn't speak to any one
12 of the attorneys impeding compliance with the settlement
13 agreement. The defendant's relentless focus on discrediting
14 plaintiffs and their attorneys is a distraction. The women's
15 actions are not on trial here; neither are plaintiffs'
16 attorneys. It's defendants' actions that are at issue. It
17 seems this is more of an attempt to embarrass the plaintiffs
18 for being unsophisticated about their medical care and to
19 attack the attorneys for their advocacy -- advocacy this
20 Court praised in 2014 and specifically asked us -- and not
21 only us, but also the Attorney General's Office to do -- to
22 continue monitoring the situation so that it never happened
23 again.

24 MS. LONDOS: Your Honor, next week at the hearing,
25 the defendants intend to lay a proper foundation for any

1 aspect of and any document from Dr. Scharff's files we intend
2 to put in evidence. And consistent with what the Court has
3 ruled on earlier motions today, we respectfully request that
4 the Court allow us to lay the foundation for the reason that
5 we are seeking to introduce each item from Dr. Scharff's
6 files. Let me, though, lay some background for the Court.

7 On April 23rd, about a month-and-a-half ago,
8 plaintiff took a seven-hour deposition of Dr. Scharff in
9 Washington, D.C. The defendants issued a subpoena to
10 Dr. Scharff to bring his file with him, and he did.
11 Dr. Scharff keeps his records, as he held up his telephone,
12 on his telephone. He scans and keeps electronic files of
13 everything. At that deposition, he confirmed that there was
14 no motion to prohibit him from doing so and the evening after
15 giving a seven-hour deposition taken by plaintiffs' counsel,
16 he produced his entire file to both sides, electronically.

17 His files consist of sort of what I'll call two
18 categories of documents. One are inmate files. For every
19 inmate that he received correspondence from, he kept an
20 individual file, their name: Mary Smith, Suzy Jones. And
21 under that, all correspondence and documents related to his
22 investigation as to each plaintiff, he would receive a letter
23 from the plaintiff or from the plaintiff's counsel about an
24 issue. He would have documents with his investigation,
25 emailed to our clients, collecting documents, and then

1 ultimately his reply. Four-hundred-twenty-four approximate
2 letters in which he investigated to some degree or another.
3 That is one category of documents from Dr. Scharff's files.

4 The second category from Dr. Scharff's files are what
5 we may call general correspondence that didn't necessarily
6 relate to a single plaintiff, but the back and forth between
7 the counsel to my left and the counsel to my right --
8 predecessors in the case -- about general issues.

9 Suffice it to say, Dr. Scharff has been a thoroughly
10 engaged compliance monitor. He has not simply shown up
11 quarterly and then shut the book until the next quarterly
12 inspection. There's a plethora of documents that lay out the
13 history from February, 2016, to the present.

14 Your Honor alluded earlier in this hearing to the
15 defendants couldn't just do nothing since the settlement
16 agreement. What that body of documents show is everything
17 that was being done: the back and forth, the constant
18 communication, et cetera, between counsel -- because counsel
19 for both sides and Dr. Scharff and the issues that were
20 discussed and the back and forth was near constant. We will
21 lay a foundation for those portions of those records that we
22 deem relevant, and we'll lay that foundation next week and we
23 would ask the Court to listen.

24 I will give the Court just a slight preview because
25 this is crucial to the issues in this case and crucial to the

1 issue that this Court will ultimately be deciding on whether
2 the settlement agreement was breached.

3 In June of 2017, just a few months before the motion
4 for show cause was filed, there was a heavy back and forth
5 exchange among Dr. Scharff and the parties' representatives,
6 including counsel, wherein Dr. Scharff told plaintiffs' team
7 that, I have been thinking about the progress at Fluvanna to
8 date, and while in most of the specifics it has been
9 substantial, I see little improvement in the tenor of the
10 relationships between the plaintiffs and the institution or
11 the providers.

12 He said in June of 2017, just a few months before
13 this show cause, that the progress at Fluvanna in most of the
14 specifics has been substantial.

15 His beliefs, his analysis, his investigation that he
16 brought as compliance monitor, not only the macro during his
17 quarterly inspection, but the micro on 424 individual patient
18 complaints, and the back and forth, is important to show this
19 Court the totality of the situation that was going on from
20 February, '16 to the present. It is substantial and it is
21 important.

22 Dr. Scharff also says repeatedly to plaintiffs'
23 counsel, by way of example, To whatever extent you might be
24 fanning the flames, you may be part of the problem. The
25 contractor is, by all measures, at least as good as any in

1 the business, and they have poured resources into the
2 contracts far beyond the terms of the contracts. They have
3 offered an outrageous salary for the prospective medical
4 director.

5 There is this ongoing history of Dr. Scharff engaging
6 both sides, investigating the plaintiffs, that we learned
7 about in total -- we certainly had an idea there were these
8 communications, there's no doubt; but in total, on April 23rd
9 when Dr. Scharff, with no motion to quash or motion to
10 produce his compliance monitor files.

11 So there is a lot of history here that is relevant to
12 the issue of: Have the defendants breached a settlement
13 agreement? What have they been doing? We will lay that
14 foundation next week for the aspects of Dr. Scharff's files
15 that we deem -- that we believe admissible and ask the Court
16 to accept that evidence at that time. But this case and this
17 story of what has happened is not complete without an
18 understanding of both the macro investigation and the micro
19 on 424 letters by plaintiffs and their counsel to
20 Dr. Scharff.

21 So we would ask this Court to deny this motion at
22 this time, take it on a case-by-case basis as it comes up.
23 Certainly, in any patient/provider, medical provider
24 relationship, there are two sides to the equation and the
25 settlement agreement implicitly empowers Dr. Scharff to

1 investigate, and implicitly and explicitly -- excuse me -- to
2 instruct Dr. Scharff to assess and evaluate the defendants'
3 progress, which he has done and which will be illuminated by
4 his files.

5 Thank you, Your Honor.

6 MS. CIOLFI: Your Honor, if I may.

7 There's simply nothing stopping the defendants from
8 calling Dr. Scharff and asking him about his investigations,
9 about defendants' level of engagement, about the progress
10 made on this case. There's also nothing stopping defendants
11 from calling their own people to ask them about the same
12 things, but it doesn't change the fact that the
13 communications from defendants back to Scharff and Scharff to
14 defendants are nothing but self-serving hearsay.

15 Dr. Scharff, if -- they have the opportunity to use
16 them for impeachment to the extent what he says is
17 inconsistent. But the reality is -- so as to the point about
18 the motion to quash, the plaintiffs simply didn't think that
19 would be necessary. We thought the monitor would honor the
20 ex parte conditions of the settlement agreement and, quite
21 simply, we didn't want to further antagonize the monitor,
22 who's already expressed his extreme distaste for litigation.
23 But just because the documents were produced doesn't make
24 them admissible. And we have not waived our objection.

25 THE COURT: They're not admissible just because they

1 were produced. They'll have to show that they are
2 admissible.

3 MS. CIOLFI: That's correct.

4 And, Your Honor, the plaintiffs' intent to bring this
5 motion was because of the volume of the evidence, the number
6 of the exhibits, to simply -- they all have the same
7 recurring theme. And we wanted to bring this motion as a
8 matter of efficiency to deal with them all at once.

9 Dr. Scharff has said lots of things. He's says lots
10 of things to both sides, and we'll both have an opportunity
11 to ask him about those at trial instead of just bringing in
12 various snapshots of what he's said in the context of one
13 particular time over the course of the more than two years
14 that he's been monitoring the settlement agreement.

15 THE COURT: He'll be there. He can testify and the
16 Court will rule at the time on any cross-examination or
17 direct examination of him.

18 Anything else?

19 MR. SCHNETZLER: Your Honor, Nathan Schnetzler,
20 again, for the defendants.

21 There are two additional motions on the Court's order
22 regarding oral argument today. Those are the defendants'
23 motion on the disclosure by the plaintiffs of the
24 demonstrative summaries, and the motion for the site visit.
25 I know you've allocated just a small portion of time for

1 those. I'll be happy to do them both at the same time.

2 THE COURT: Go on.

3 MR. SCHNETZLER: With respect to the demonstrative
4 summaries, as we stated in our motion that we filed, the
5 summaries were not disclosed until well beyond the deadline
6 set in the Court's pretrial order for the disclosure of
7 exhibits. I know the plaintiffs have taken the position that
8 they did not need to be disclosed because they were being
9 used for demonstrative purposes only. That's not the only
10 reason we've filed our motion, of course. We've also
11 suggested they are not proper summaries to begin with because
12 the information those charts draw from is not consistent with
13 the voluminous filings as required under Federal Rules of
14 Evidence 106, and also, the summaries omit significant
15 information regarding the compliance monitor's evaluations of
16 the progress at Fluvanna. As we have made very clear at this
17 hearing today and in our briefs that we submitted to the
18 Court, Your Honor, the defendants' position is that progress
19 is what the settlement agreement requires and that's what the
20 defendants have been doing. So it's important that any of
21 the evidence that they tend to submit, whether demonstrative
22 or otherwise, be accurate and portray the full picture of
23 what the writings are they intend to summarize.

24 Also, Your Honor, the summaries, for the most part,
25 reflect mostly what Dr. Scharff himself has already

1 summarized in tables in his reports. It's now becoming the
2 summary of a summary, and we don't think that's proper under
3 FRE 1006.

4 Your Honor, for those reasons -- that they were
5 untimely disclosed, they do not portray all of the
6 information contained in the writings, and exclude probative
7 information regarding the defendants' progress under the
8 settlement agreement, and the fact they are not proper
9 summaries, we don't believe that they should be permitted.
10 And I understand, again, these are claiming to be
11 demonstratives, but the problem is you can't unring that
12 bell. So we believe they need to be accurately portrayed.

13 With respect to the site visit, Your Honor, we
14 believe that a site visit would greatly help the Court in its
15 evaluation of the defendants' progress under the settlement
16 agreement, and we think it's interesting that the plaintiffs
17 oppose the Court going and seeing the facility and seeing the
18 progress that's been made since February of 2016.

19 With respect to the progress here, the plaintiffs
20 essentially, in their show cause motion, want the Court to
21 reject the conclusion of the compliance monitor that the
22 Fluvanna Center for Women has made progress in its compliance
23 with the settlement agreement, as it's required to do. We
24 believe the Court seeing for itself with its own eyes the
25 conditions at Fluvanna will help the Court evaluate whether

1 or not the Department of Corrections has met its obligations
2 under that settlement agreement.

3 As to the issues the plaintiffs have raised with
4 respect to logistics in terms of the Court being able to
5 speak with witnesses or there being a tour guide, we laid out
6 what we thought might be a proper way to do this, by having
7 one attorney from each side present if the Court so desired.
8 To the extent that the plaintiffs' claim it would be scripted
9 or planned, subject to, obviously, Your Honor's security
10 concerns about visiting the prison, I don't think, with
11 respect to this particular motion -- the warden has advised
12 that a mere 24-hour notice would be enough for him to prepare
13 any security concerns that the Court may have if it did make
14 a visit, which makes it a bit tough to sort of script as the
15 plaintiffs claim that the defendants are apt to do.

16 For that reason, Your Honor, we think this is a
17 significant case and it would be extremely helpful for the
18 Court to see the conditions at Fluvanna before making its
19 determination.

20 Thank you.

21 (The law clerk conferred with the Court.)

22 MS. CIOLFI: Your Honor, Angela Ciolfi, again, for
23 the plaintiffs.

24 I just want to address the issue regarding the
25 demonstratives, and then my colleague, Ms. Ogunkeyede, will

1 address the site visit.

2 I just want to make one thing clear at the outset.
3 These are not summaries of evidence offered under FRE 1006.
4 Plaintiffs plan to offer as demonstratives only up to four
5 demonstratives, all of which derive from the compliance
6 monitor's report or his performance ratings, which both
7 parties have designated as exhibits and not objected to.
8 These are not for the purpose of proving a fact. They are
9 merely to illustrate the significance of evidence that will
10 be before the Court; namely, the monitor's 9 reports, each of
11 which is 10 to 20 pages long, and the 9 accompanying
12 performance ratings charts.

13 I brought them with me. These are the monitor's
14 reports and the performance ratings summaries on
15 single-spaced paper. It is merely and simply to illustrate
16 the delays, the repeated recommendations, the lack of
17 progress or changes over time in the ratings by the monitor.
18 In fact, the reason this is so important is just as
19 defendants said is to counter that plaintiffs want to reject
20 the conclusion of the monitor, but that's exactly what we
21 seek to portray over time in these demonstratives. They're
22 intended to be used as an aid in opening, to aid the Court's
23 understanding and to prepare the Court to receive the
24 testimony and evidence. They're not evidence themselves.
25 They're never intended to be evidence, and the reports

1 themselves are the evidence. Since they're not evidence or a
2 summary of evidence under FRE 1006, they weren't required to
3 be disclosed. However, plaintiffs did disclose them; and we
4 disclosed them nearly a week before trial, which is more than
5 enough time to review and counter those with their own
6 illustratives about the lack of progress.

7 The defendants say they are misleading because they
8 don't show the partial compliance, but plaintiffs' position
9 in this case is that full compliance is required and,
10 ultimately, that's going to be up to the Court. But the
11 bottom line is this case is not going to be decided by a
12 jury. So the admonitions about not being able to unring the
13 bell harken back to what the Court said probably an hour ago:
14 The jury is not going to be contaminated here by these
15 illustrative aids and the Court can decide if they are useful
16 to the Court.

17 THE COURT: All right.

18 MS. OGUNKEYEDE: Your Honor, very briefly as to
19 defendants' motion for a site visit.

20 Plaintiffs do not oppose that motion just for
21 opposition sake. We simply don't think that it is relevant
22 to the facts at issue here. Of course, plaintiffs note that
23 the Court's order from yesterday indicated that if a site
24 visit is taken, the Court -- it would not occur until after
25 next week's hearing. And plaintiffs stand by the position

1 that after that hearing that it will be apparent to the Court
2 that a site visit is not relevant to the issues that are
3 subject to the Court's consideration.

4 Also, Your Honor, the last point on the Court's order
5 from yesterday said that the parties should be prepared to
6 discuss the allotment of time at trial. I'm not sure that
7 we've covered that and I believe my colleague, Ms. Ciolfi,
8 has some information to present to the Court on that issue.

9 THE COURT: We haven't covered it.

10 When you decide to enter demonstrative evidence, do
11 you have a witness?

12 MS. CIOLFI: No, Your Honor. The reports will come
13 in -- they are not objected to in the pretrial order, which
14 the Court hasn't entered yet. The parties have agreed
15 exhibits not objected to come in.

16 THE COURT: Is there any objection that the numbers
17 on the demonstrative exhibits are not accurate?

18 MR. SCHNETZLER: To the extent it doesn't include the
19 partial compliance that Dr. Scharff is going to evaluate.

20 MS. CIOLFI: If I may, the numbers in the exhibit
21 that the Court is holding up pertain to the number of times
22 the monitor made a recommendation particular to the
23 settlement agreement --

24 THE COURT: I understand.

25 When you offer a demonstrative evidence, it usually

1 is to help the witness -- explain the witness's testimony.

2 MS. CIOLFI: These are simply to illustrate at
3 opening -- to summarize the evidence that -- we had not
4 planned to admit them as evidence. Simply want to use them
5 to summarize the voluminous evidence that will be admitted.

6 THE COURT: All right.

7 MS. CIOLFI: So if I may understand the Court
8 correctly, then I am permitted to use them at opening if they
9 are not being admitted into evidence?

10 THE COURT: I'll give the defendant the last word
11 before I decide.

12 MS. CIOLFI: Okay, Your Honor. Thank you.

13 Do you want me to address the timing issues or wait
14 until defendants have an opportunity to respond regarding the
15 demonstratives?

16 THE COURT: Go ahead with any argument you've got.
17 This will be your last word on the issue.

18 MS. CIOLFI: I'm sorry.

19 In the Court's order, the Court asked for --

20 THE COURT: I was misunderstanding. My fault.

21 MR. SCHNETZLER: Your Honor, we would just continue
22 our objection because we believe that these do not accurately
23 summarize the materials that Dr. Scharff has prepared. We
24 would just maintain that objection.

25 Thank you.

1 THE COURT: I don't think I'll be misled by it. It
2 can be used as a demonstrative exhibit and be subject to
3 comment by the -- the deficiencies, the defendant can bring
4 out. I don't see a problem with it.

5 With regard to the site visit, I'll make that
6 decision if I think I need to go there.

7 With regard to the timing, we've got five days set
8 aside for trial. Are y'all going to be able to get your case
9 in? You don't get all five days.

10 MS. CIOLFI: That is the hope, Your Honor.

11 We have worked -- the plaintiffs have worked really
12 hard to tighten our case and condense our evidence. We have
13 cut our witness list in half, from 17 to 8. We are
14 submitting a lot of evidence through deposition designations
15 under Rule 32. We have worked with the defendants and Mr.
16 Juhan to reduce the need to argue over objections about the
17 deposition designations, so it's just to be about the things
18 that actually the parties rely on in our post judgment
19 briefing and the Court relies on in their findings. We've
20 come in twice to practice the court's technology; though I
21 can't make promises we won't fumble a bit. We really are
22 aiming to be done with our evidence by midmorning or midday
23 Wednesday, and we'd like to reserve some time for rebuttal.
24 But there are some things, of course, that are not in our
25 control, such as the length of the defendants' cross and the

1 number of objections and arguments over those.

2 So -- but that is our goal, and I wanted to raise one
3 related issue, which is that the Court's reservations about
4 the rebuttal report by Dr. Greifinger may cause us to
5 reevaluate some of the lineup of witnesses if indeed he's not
6 permitted to testify about the women whose care we submit has
7 been in breach of the settlement agreement in this March,
8 April timeframe, in which the defendants are saying
9 everything has been fixed. So normally, in a normal case, we
10 would just simply call those witnesses to come in to testify
11 about that, and they would be able to deliver themselves to
12 the courtroom. However, because most of our witnesses are
13 incarcerated, we're somewhat at the mercy of the defendants
14 in bringing them to the courtroom. So we will reevaluate
15 over the weekend and we would ask this Court's indulgence to
16 be able to move for additional transport orders if that's
17 necessary.

18 Related to that, we had informed the defendants that
19 one of the women who we previously disclosed, Margie Ryder,
20 may be a rebuttal witness, which would normally happen on
21 Friday. We learned yesterday that she's terminally ill and
22 she has some sort of medical appointment or something on
23 Friday. We just wonder if at some point during the week, if
24 we believe it's necessary to call her, potentially to take
25 the witnesses out of order so that she does not have to miss

1 a medical appointment on Friday.

2 We just wanted to preview those sort of timing issues
3 for the Court.

4 Then finally, it's my understanding the Court usually
5 starts at 9:30 and we wondered whether the Court would
6 consider starting at 9 as a potential way to fit everything
7 in.

8 Thank you, Your Honor.

9 MS. LONDOS: Thank you, Your Honor.

10 With the Court's permission or blessing, we would be
11 prepared to start our case Wednesday at lunchtime if they are
12 going to go -- and have our first witness that we would put
13 on be there Wednesday at lunch.

14 We did -- we will certainly be succinct and prompt
15 with our witnesses going forward.

16 We have one housekeeping matter that we haven't
17 addressed with plaintiffs' counsel yet. There's been so much
18 up in the air with certain things in this case.

19 But three of the named defendants--: Director Clarke,
20 Mr. Robinson, and Warden Aldridge -- were not going to plan
21 to be at trial unless Your Honor insisted or wanted them
22 there. Certainly, they are operating the Virginia Department
23 of Corrections, and on behalf of the Commonwealth of
24 Virginia, we would prefer that they be at their jobs. We
25 certainly want to ensure that the Court doesn't find that in

1 any way unacceptable or disrespectful. Everyone wants to
2 keep -- they have not been subpoenaed.

3 THE COURT: I wouldn't require them to be there
4 unless they're going to be called as adverse witnesses or
5 something.

6 MS. LONDOS: We just wanted to make sure that there
7 was going to be no negative implications by them not being
8 there.

9 THE COURT: We try these cases all the time by people
10 who aren't there.

11 MS. LONDOS: Thank you, Your Honor.

12 We'll be ready to start our first witness Wednesday
13 at lunchtime.

14 And no objection to taking a witness out of order for
15 medical reasons.

16 Thank you.

17 THE COURT: Anything else?

18 MS. CIOLFI: No, Your Honor. Thank you for spending
19 the afternoon with us.

20 We'll see you next week.

21 THE COURT: That's my job.

22 MS. CIOLFI: Oh, I'm sorry. There's one other thing
23 today. Counsel just reminded me. With all apologies to the
24 Court.

25 In reviewing the submissions last night, it came to

1 the plaintiffs' attention that we misquoted the Court in our
2 pretrial brief, inadvertently.

3 There are seven words that are incorrect and I'm not
4 sure in the flurry and exchange of rounds of editing how that
5 happened, but we would like to submit a corrected pretrial
6 brief correcting the incorrect quote for the Court, if that's
7 all right.

8 Thank you.

9 THE COURT: Anything?

10 MS. LONDOS: (Indicating no).

11 THE COURT: Thank you all.

12 One thing we could do; by Tuesday, if you all would
13 like, we could start at 9, and maybe that will give us a
14 little more time.

15 MS. CIOLFI: That would be acceptable.

16 THE COURT: Does that suit everyone?

17 MS. LONDOS: Absolutely.

18 MS. CIOLFI: Shall we plan to start at 9 on Monday?

19 THE COURT: No.

20 MS. CIOLFI: Tuesday. Yes, Your Honor.

21 THE COURT: Recess court.

22 (Proceedings concluded at 4:10 p.m.)

23 "I certify that the foregoing is a correct transcript from
24 the record of proceedings in the above-entitled matter.
25